

STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC No. 1923480

Takara L. Stewart,)
)
 Claimant,)
)
 v.)
)
 SC CVS Pharmacy, LLC,)
)
 Employer,)
)
 and)
)
 XL Insurance America, Inc,)
)
 Carrier/Defendants.)
 -----)

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SC Court of Appeals

FULL COMMISSION HEARING

Monday, May 8, 2023
2:56 p.m. - 3:16 p.m.

The Full Commission Hearing was heard before Commissioners Melody James, T. Scott Beck and Cynthia C. Dooley virtually via ZOOM on the 8th day of May, 2023, before Amber Scarborough, Court Reporter and Notary Public in and for the State of South Carolina.



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APPEARANCES

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EXHIBITS

(There were no exhibits marked during the hearing.)

STIPULATIONS

It is stipulated and agreed that this deposition is being taken pursuant to the Administrative Procedures Act and the South Carolina Rules of Civil Procedure.



1 CALL TO ORDER:

2 **COMMISSIONER DOOLEY:** Madame Court reporter, if
3 you'll call the case.

4 **MADAME COURT REPORTER:** Today is May 8th, 2023.
5 This is South Carolina Worker's Compensation
6 Case Number 1923480. This is the case of
7 Takara L. Stewart versus South Carolina CVS
8 Pharmacy, LLC and XL Insurance America.

9 The Appellant is the Defendant,
10 represented by Michelle DeLuca Yarbrough. The
11 Respondent is represented by Stephen J. Wukela.

12 Each side is allowed ten minutes for oral
13 argument and the Appellant three minutes in
14 reply. You are requested to argue the grounds
15 of exception and stay within the record.

16 **COMMISSIONER DOOLEY:** All right, Ms. Yarbrough?

17 APPELLANT/DEFENDANT'S POSITION:

18 **MS. YARBROUGH:** May it please the Commission. I
19 represent CVS Pharmacy. This case involves an
20 incident which occurred on December 26th of
21 2019. A CVS employee was vacuuming near the
22 store entrance with her back turned toward the
23 store. She's a female employee. A customer,
24 who was also a female, was leaving the store,
25 walked past the Claimant, touched her, padded



1 her, bumped her, whatever you want to say, made
2 this motion like that (indicating) to her rear
3 and said "you've got a big 'ol butt" and
4 continued walking through the exit door. The
5 Claimant turned to the customer, you can look
6 at the video, and my impression is she smiled,
7 she continued to vacuum the floor. She
8 performed her remaining job duties. Closed the
9 store. Did not cry or appear upset on the
10 cameras. Did not even stop what she's doing.
11 She continued to vacuum. She did appear hurt
12 on the camera. She did not alter her regular
13 course of work. She did not call her
14 supervisor or report any accident or speak with
15 her co-workers about it that day. She made a
16 report about it to police about ten days later.
17 She told her supervisor a couple of weeks later
18 and when she did that the supervisor said she
19 wasn't crying or frantic. She didn't even seem
20 very upset about it. She continued to work for
21 about two and a half, three months without any
22 problems, without showing any signs of stress,
23 anxiety, depression, trauma, or psychological
24 issues. And then once the customer was booked
25 and then released for the incident that's when



1 the Claimant came in said she was concerned
2 about retaliation from the customer. She
3 decided at that point she couldn't work and
4 then she was concerned about the customer
5 coming into the store and retaliating against
6 her. At that date, it was about March 13th of
7 2020, she said that she had been molested as a
8 child and she was crying and upset at that
9 point. She didn't report any prior
10 molestations to any of her physicians. There
11 was -- or police. There was no documentation
12 of this. She testified that she told her
13 relatives about this, including her Aunt with
14 whom she was living at the time of the hearing.
15 However, she didn't bring her Aunt in to
16 testify or corroborate her testimony at the
17 hearing. She ---

18 **COMMISSIONER BECK:** Ms. Yarbrough, was there any
19 indication of any prior mental health,
20 counseling, treatment, anything of that nature?

21 **MS. YARBROUGH:** No, sir, there was not. She's
22 alleging a physical-mental, or a mental-mental
23 injury. I will point out that the Form 50s
24 never alleged a physical mental injury. She --
25 her Form 58 in hearing were the first times



1 that a physical-mental injury was alleged. I
2 will tell you that there were no body parts
3 alleged that were ever injured. More
4 importantly, the Claimant testified under oath
5 that she wasn't physically injured or hurt.
6 She testified that she didn't report a physical
7 injury to her physicians. Her physicians
8 testified that the Claimant didn't report
9 physical injury and she -- and the physician
10 said she did not diagnose her with a physical
11 injury. The inquiry should end right there
12 since there's no physical injury. If the Court
13 believes there's a physical injury the Claimant
14 still has to produce requisite medical evidence
15 under 42-1-160. In medically complex cases an
16 employee shall establish the medical evidence
17 that the injury arose in the course of
18 employment. And, you know, the definition of
19 medical evidence means expert opinion or
20 testimony stated to a reasonable degree of
21 medical certainty. This is not a statutory --
22 excuse me -- this is not a courtesy or
23 preferred language, it's just the statutory
24 requirement established by our legislature. If
25 the causation opinion is not clearly stated to



1 a reasonable degree of medical certainty the
2 inquiry ends and the Claimant has not met her
3 burden of proof. And in addition to 42-1-160,
4 the 42-9-35 says this, in an accident -- if you
5 have an accident which aggravated a pre-
6 existing condition the statute says that the
7 employee shall again establish by that medical
8 evidence that either the injury aggravated the
9 pre-existing condition or the pre-existing
10 condition aggravated the injury. And again,
11 you need to establish by an expert opinion
12 stated to a reasonable degree of medical
13 certainty. So, let's look at the actual
14 evidence. And what I would like to do just to
15 share my screen -- can y'all see my screen if
16 I share it?

17 **COMMISSIONER DOOLEY:** Yes, I can.

18 **COMMISSIONER BECK:** Yes, we can.

19 **MS. YARBROUGH:** Okay. So I'm sharing my screen.
20 This is the deposition transcript of the
21 doctor. If you look at line eight it says "do
22 you have an opinion to a reasonable degree of
23 medical certainty as to whether this incident
24 that she has described in the CVS would have
25 aggravated a pre-existing condition?" "Yes, of



1 course." And then you could go down to 16.
2 "Okay, and do you have any opinions as to a
3 reasonable degree of medical certainty as to
4 whether the complaints that she made to you
5 when she saw you were the result of that
6 aggravation." The answer is "Yes, she is." He
7 is asking her if she has an opinion and she
8 says yes. She says she has an opinion but she
9 never was asked what her opinion was so she
10 doesn't express that opinion. If there is no
11 opinion stated to a reasonable degree of
12 medical certainty then you can't meet the
13 burden of proof for causation statutorily
14 required under the Act. Then let's look at
15 other medical evidence. "Was there other
16 medical evidence?" "Yes." Dr. Hicks who gave
17 that testimony is a general practitioner. We
18 had a -- a board certified psychiatrist
19 evaluate her and he opined that she doesn't
20 have post traumatic stress disorder. She has
21 depression related to life stressors and not
22 the work place incident. She doesn't have
23 psychiatric issues related to the workplace
24 incident. So, therefore, there's no physical-
25 mental injury.



1 Now, let's quickly look at the mental-
2 mental claim. We've already talked about the
3 medical evidence and there's no causation, but
4 we also have to look at extraordinary and
5 unusual. Yes, a customer popping you on the
6 butt is not something that occurs regularly at
7 the CVS. It is definitely unusual. The Court
8 in the 2007, I believe the case of *Hansson*
9 *versus Scalice Builders* said where physical
10 harm is lacking the Court should look initially
11 for more in the way of extreme outrage as an
12 occurrence that the mental disturbance claimed
13 is not fictitious. There's no extreme outrage
14 here. This was an isolated incident one second
15 in length. The Claimant was smiling afterward
16 in the video. She continues vacuuming like it
17 didn't effect her. She continued to work and
18 close the store that evening. There's no
19 extreme outrage here. And, if you look at Dr.
20 Hicks deposition transcript and the word index
21 there's no words unusual and extraordinary even
22 in the transcript so there can't be found in
23 Dr. Hicks' deposition testimony a causation of
24 opinion establishing that the unusual and
25 extraordinary circumstances of the alleged



1 assault at work caused or aggravated the
2 Claimant's alleged pre-existing post traumatic
3 stress disorder condition. And also,
4 Commission Taylor awarded four months of TTD
5 benefits based on the compensability issue.
6 Dr. Hicks initially said in her deposition
7 testimony that she took her out of work for
8 four months. But then later on in cross-
9 examination after she was confronted by her
10 testimony she agreed that she only took her out
11 one month in May and one month in August. So,
12 that -- her testimony changed and so there's no
13 medical support for four months, only two
14 months, and only if you find TTD benefits
15 allowable. And then let's look at the medical
16 benefits. There is a Dr. Hopkins that
17 diagnosed with post traumatic stress disorder.
18 I will tell you that Dr. Hopkins is a doctor of
19 education and not a doctor of medicine. And
20 then under 42-15-60 you have to have that
21 medical, that magic language, reasonable degree
22 of medical certainty. Dr. Hicks says she does
23 need future medical treatment in terms of
24 visits but not to a reasonable degree of
25 medical certainty. We have the right to direct



1 medical treatment. She -- Taylor --
2 Commissioner Taylor awarded Dr. Hicks to decide
3 on her medical treatment. Dr. Hicks lives two
4 and a half, or works two and a half hours away
5 from where the Claimant lives, so that's
6 unreasonable. And there's no good faith basis
7 to allow Dr. Hicks instead of the Defendants to
8 identify the medical treatment that she needs
9 and to direct medical care.

10 In terms of the Claimant's credibility, it
11 is all outlined in the brief. She has major
12 credibility issues. It's easier to falsify
13 mental injuries. Y'all are the ultimate fact-
14 finder of credibility. She lied on her
15 employment application. She lied in her
16 deposition. With regard to law suits that she
17 previously was involved in, she had judgments
18 against her regarding evictions. She lied on
19 her tenant agreements. She reported to doctors
20 that she was living out of her car and she was
21 homeless, but she agreed and under pressure and
22 in her hearing she testified she never lived
23 out of her car. Her doctors said there were no
24 objective findings in her testimony, I'm mean,
25 in her doctor visits. They were relying on her



1 subjective reports. And when she said I'm
2 living out of my car because of this accident,
3 but then later agrees in her hearing testimony
4 that she never lived out of her car and she was
5 never homeless. That's important information
6 that needs to be addressed.

7 In regards to the motion to admit newly
8 discovered evidence, this information was found
9 right after the hearing about her living on
10 Bordeaux Lane when she said she never lived
11 there. I got her tenant records. As soon as
12 I figured this out, based on Equifax reporting,
13 it came out two days before the hearing and it
14 says that she that was -- that she had been
15 making forty-five hundred dollars a month
16 working for the Department of Defense at the
17 same time she was requesting temporary total
18 disability benefits. And, if this case is
19 found compensable we would ask that that
20 information be allowed in the record so that we
21 can cross-examine her on that and her working
22 during the time that she was awarded temporary
23 total disability benefits.

24 **COMMISSIONER DOOLEY:** Thank you, Ms. Yarbrough, and
25 you will have three minutes to reply. Mr.



1 Wukela?

2 **MS. YARBROUGH:** Thank you.

3 **RESPONDENT/CLAIMANT'S POSITION:**

4 **MR. WUKELA:** Good afternoon. Please the Commission.

5 I'll take the second issue first, the motion to
6 admit newly discovered evidence. This case was
7 tried on June the 3rd of 2021. The Defendants
8 motion to admit newly discovered evidence cites
9 their subpoena that was issued in June the 17th
10 of 2022, and their reply and then the cited
11 another subpoena to the same place that was on
12 June the 7th, I believe, no, I'm sorry June the
13 9th of 2021. Both of those were after the
14 hearing. There's no explanation why these
15 subpoenas couldn't have been issued prior to
16 the hearing. They deal with a street address
17 that the Defense examined the Claimant about at
18 the hearing. Of course, is Commission aware
19 that the rule requires reasonable diligence.
20 They had a year from the first Form 50 to the
21 hearing to conduct discovery. It also requires
22 that the evidence be not of an impeaching
23 nature. The Defense counsel has argued this
24 goes to credibility and moreover it's hearsay
25 and furthermore I'm not sure that this



1 application indeed says what the Defense argue
2 it says. Of course, the Commissions read my
3 brief, but it talks about the Employer being
4 the Department of Defense and having worked for
5 how long it says December of 2010 for forty-
6 five hundred dollars. Incidentally, the
7 Commission -- the Claimant would also argue
8 this is quite strange that she was earning
9 fifty-four thousand dollars a year working for
10 the Department of Defense while she was also
11 working a job in Florence CVS earning thirteen
12 thousand dollars a year. And, if that's the
13 case, the average weekly wage we would argue
14 for that to be re-computed. As to the merits,
15 Commission, as Commissioner Beck inquired this
16 is not a lady who's had a long history of
17 psychological treatment or problems. She
18 testified that she was groped and sexually
19 assaulted on the day of the accident and that
20 more importantly that she was sexually abused
21 when she was seven or eight as a child by a
22 family member and that she was cautioned by her
23 other family members at that time not to talk
24 about it or disclose it. Dr. Hicks testified,
25 which is pretty self-evident, that if one has



1 that sort of sexual abuse in their background
2 when they're groped by a person or a customer
3 who's in a CVS it's natural that that would
4 cause that aggravation of that prior condition.
5 Now, Defense argues that Dr. Hicks never said
6 that to a reasonably degree of medical
7 certainty. Well, the Commission can read that
8 testimony and the testimony that follows it
9 where it's pretty clear what Dr. Hicks is
10 saying, but the Defense cites 42-1-160 as the
11 requirement for a statement to a reasonable
12 degree of medical certainty. As the Commission
13 is aware that applied in medical complex cases
14 involving MRIs or more complex tests. That
15 doesn't apply here. In any event, it's not a
16 ---

17 **COMMISSIONER JAMES:** Mr. Wukela, you said it doesn't
18 apply. Well, down in the stress and mental
19 injuries that are alleged to have been
20 aggravated by work related physical -- okay,
21 that says physical. All right. Go ahead.

22 **MR. WUKELA:** I'm sorry. Yeah, and I think you're
23 right.

24 **COMMISSIONER JAMES:** It depends on which -- what
25 we're talking about whether it's a physical-



1 mental or whether it's mental-mental as to
2 certain portions of the statute.

3 **MR. WUKELA:** Yeah. But, Your Honor, the section I
4 was specifically referring to was 40- -- 42-1-
5 160 Sub E that establishes that requirement in
6 medically complex cases. I agree that wouldn't
7 apply in mental-mental cases and, of course, we
8 argue, and I think the single Commissioner
9 found, that being sexually groped by a customer
10 is an extraordinary and unusual circumstance.
11 But, even in a physical-mental case given that
12 it didn't require highly scientific procedures
13 such as MRIs, CAT scans, X-rays and similar
14 diagnostic procedures, I don't think it would
15 qualify as medical complex that requires a
16 statement to a reasonable degree. But, Your
17 Honor, I would argue beyond that. This is
18 elevating the technical beyond the practical
19 and the reasonable to a nth degree. It's clear
20 what Dr. Hicks is testifying to in that
21 testimony and it's obvious. It's also
22 something that's pretty self-evident in common
23 place understanding that if a person is abused
24 sexually by a family member in their early
25 years that an event that might seem not as



1 significant to Ms. Yarbrough or her clients
2 might certainly seem more significant to
3 someone in that posture particularly where
4 they're scared of retaliation.

5 I'll just speak very quickly to the
6 temporary total. Simply I refer you to APA 8
7 page 36. The Family Medical Leave Act form is
8 completed by Dr. Hicks and she sets the dates,
9 but Commissioner, we're talking about forty-
10 three hundred dollars in temporary total for a
11 period of six months where the lady was earning
12 a compensation rate of an average weekly wage
13 of two hundred and fifty-eight dollars a week.
14 She -- the Claimant sought a finding of
15 compensability to be groped by a customer and
16 I understand Ms. Yarbrough doesn't think it's
17 significant. She goes to great lengths to
18 testify about what she thinks the video shows
19 to the extent she says she thinks the Claimant
20 was smiling. I ask the Commission to look at
21 the video themselves or to read the deposition
22 testimony of Dr. Hicks who was shown the video
23 and who said it was consistent with her
24 opinions that when a person is sexually abused
25 in their childhood and scared by their family



1 to not reveal it and then is groped at her
2 workplace that she might have an aggravation of
3 that pre-existing condition and be entitled to
4 some treatment. Commission, that's my case.

5 **MS. DOOLEY:** All right. Thank you. Ms. Yarbrough,
6 you have three minutes to reply.

7 **APPELLANT/DEFENDANT'S REPLY:**

8 **MS. YARBROUGH:** Thank you. In terms of medically
9 complex cases, it talks about similar
10 diagnostic techniques and when you diagnose
11 post-traumatic stress disorder you have to use
12 the DSM to determine whether they need that and
13 so I would say it's a medical complex case in
14 terms of diagnosing the post-traumatic stress
15 disorder. But, you also have to look at 42-9-
16 35 and in that statute it does require the
17 medical evidence to be stated to a reasonable
18 degree of medical certainty.

19 In terms of the prior sexually assault
20 that the Claimant alleges, you have to look at
21 her credibility and the fact the there's no
22 documentation or proof or testimony from
23 anybody that can collaborate that. And, that
24 if it was such an extreme reaction because of
25 her prior sexual assault you would have noticed



1 it. You won't -- wouldn't have seen, but you
2 would have noticed it in the first two and a
3 half months before or immediately after the
4 accident.

5 With regard to the newly discovered
6 evidence, the reason why we didn't know about
7 it from the time of the hearing -- the Form 50
8 was filed to the time of the hearing was
9 because she didn't include that information on
10 her Form 50. She put a wrong address on her
11 Form 50. She gave a wrong address on her -- in
12 her deposition testimony. She lied about it
13 and had every ability to testify truthfully
14 about it. We took her deposition twice and she
15 didn't provide that information to us. So,
16 it's not our issue that we have to identify
17 when a person is lying to determine what her
18 current address is. Thankfully we just pulled
19 a search up on Westlaw and figured it out where
20 she was living and that's why we brought that
21 information and asked her about it at the
22 hearing. And from that information we did
23 within a week of the hearing found who owned
24 the property, found that it was a rental
25 property, found the property manager and then



1 subpoenaed those documents within seven days of
2 the hearing on June 9th, 2021, and once we had
3 that information and got it, we brought it to
4 the attention of Claimant's attorney that we
5 wanted to submit a motion for newly discovered
6 evidence and he requested that we wait until
7 after Commissioner Taylor had issued her order
8 which we did. Thank you.

9 **COMMISSIONER DOOLEY:** Thank you.

10 **(There being nothing further, the hearing concluded**
11 **at 3:16 p.m.)**

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