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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 1106685

David Glenn Jones, Appellant,

v.

Warden and Smith Concrete
and Bridgefield Casualty Insurance
Company, Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The workers' compensation commission found that David Jones was lying about his health, did not need any future medical treatment, and was fit to work. The commission made these findings even though both of Mr. Jones' doctors said that they believed his complaints and that in his present condition, he could *not* work. The issue in this appeal is whether the commission's findings are completely without evidentiary support, thus rendering the decision erroneous as a matter of law.

STATEMENT OF THE CASE

David Jones worked for Warden & Smith Concrete as a dump truck driver. At the time of his injury, he had worked for Warden & Smith for 6 years.

Mr. Jones was injured on June 1, 2011, while loading his truck with concrete. Jones said that he got overheated while performing this job and that he heard a pop in his back as he climbed up into his truck. (Tr. of June 28 Hr'g, p.10, line 1 - p.12, line 5).

Jones claimed that this incident aggravated a back injury he suffered while working as a volunteer fireman in 2007. The last treatment for this injury was in 2009. Jones said that he had been pain-free from 2009 up until the 2011 incident involving the concrete. He also said that since the concrete incident, his back has been in constant pain. *Id.*

Jones sought treatment quickly, but not immediately. He went to Marlboro Park Hospital 5 days after his injury where he was admitted to the hospital, given pain medication, and discharged the same day. See (APA, p.10). He was ordered to stay out of work for 7 days, and he was advised to follow up with a neurologist. (APA, p.16). The medical records reflect an initial impression that Jones had a herniated disc. (APA, p.10).

In August of 2011, Jones initiated a workers' compensation claim by filing a Form 50. Warden & Smith denied the claim.

Because the claim was denied, Jones had to seek medical treatment on his own. After being discharged from the hospital, Jones did not see another medical professional until he had an independent medical evaluation with Dr. W.S. Edwards, a spine surgeon, in September of 2011. This was three months after his injury. Dr. Edwards diagnosed Mr. Jones with a back strain or sprain and recommended an MRI. (APA, pp.67-68).

Jones had the MRI in October, and he met with Dr. Edwards to review the MRI the same day. (APA, pp.69, 92). Dr. Edwards recommended an epidural steroid injection, and Jones underwent this procedure later that month. (APA, pp.69, 79).

Jones experienced problems following the injection. A little over a week after the procedure, Jones went to the pain clinic at Marlboro Hospital and was admitted to the hospital by Dr. Joe Healy, a neurologist. See (APA, pp.71-72); see also (Tr. of June 28 Hr'g, p.12, line 21 - p.13, line 6) (Jones' testimony) and (Healy Depo., p.7, line 4 - p.8, line 22) (Dr. Healy's testimony). Jones was discharged from the hospital in early November. He had been in the hospital for 7 days. (Healy Depo., p. 12, line 22 - p.13 line 15).

The claim was scheduled for a hearing in December of 2011, but immediately prior to the hearing, the parties resolved several of the issues by agreement. The parties agreed that Jones' injury was compensable, that he was entitled to temporary total disability benefits, that his past medical treatment would be covered, and that all causally-related treatment with Dr. Edwards would be covered. The commission served this consent order on December 16, 2011. See (Claimant's Br. to the Appellate Panel, Ex. A).

Five months later, in May of 2012, Warden & Smith filed a Form 21 (an employer's request for a hearing) claiming that Jones had reached the point of maximum medical improvement and asking for all temporary disability benefits to cease. Warden & Smith alleged that Jones reached MMI on December 15, 2011; the day before the commission served the consent order. Jones had been to see Dr. Edwards on the 15th, and Dr. Edwards had released Jones from his care at that time. (APA, pp.73-74).

Put simply, Warden & Smith's theory of the case was that Jones was lying about his symptoms. Warden & Smith deposed both Dr. Edwards and Dr. Healy, and Warden & Smith pointed out that both of these doctors believed that Jones' physical injury was fairly minor. Warden & Smith suggested that if Jones had truly been in constant pain since June, he would not have waited until September to see a doctor, and Warden & Smith made several other claims of this sort. Warden & Smith also pointed to Dr. Edwards' notation in December that he had nothing else to offer Jones. The claim seemed to be that there was nothing for any doctor to do because there was really nothing wrong with the patient.

Jones claimed that he was not lying, and he also claimed that although his injury was nearly a year old, he had not enjoyed a meaningful opportunity to receive medical treatment. Jones said that it had been difficult for him to get medical care while his claim was being denied, and he said that his present situation was not meaningfully different because although Warden & Smith had "admitted" his injury, Dr. Healy had recommended further testing and physical therapy which Warden & Smith was not authorizing.

On June 28, 2012, the hearing commissioner heard Warden & Smith's stop-payment request. On October 18, 2012, the hearing commissioner issued an order determining that

Jones was not credible, that he had reached MMI, and that he did not require any more medical treatment. For the date of MMI, the hearing commissioner used the date of Dr. Healy's deposition, which was June 26, 2012. (Hr'g Comm. Or., pp.13-15).

Both parties sought review of the hearing commissioner's decision. Jones appealed the credibility and medical findings; Warden & Smith argued that the date of MMI should have been the date that Dr. Edwards released Jones from his care—December 15, 2011.

On February 20, 2013, an appellate panel of the commission conducted argument on the appeal. On April 4, 2013, the panel affirmed the hearing commissioner's decision. See (App. Panel Or., pp.5-7). Jones served and filed notice of this appeal on April 30.

ARGUMENT

The Evidence Is Not Contested, and a Genuine Review of The Evidence Shows That the Commission's Findings Have No Evidentiary Support.

The evidence in this case is virtually uncontested. This is an admitted injury, the medical records speak for themselves, and the deposition testimonies of the two doctors are fairly straightforward. Mr. Jones' testimony is also straightforward and consistent. He claims that his back has been in constant pain since June of 2011 and that he does not have the ability to perform any significant physical activity.

The commission denied this case because it found that Mr. Jones was not credible. In other words, the commission found that Jones was lying about his symptoms. This finding obviously meant that Jones did not need any future medical care, but it also implies that Jones never needed any medical treatment to begin with. If all of this has been a lie, there was no need to pay for *any* temporary disability benefits or for *any* medical treatment.

There is no evidence—none—that supports these findings.

The commission gave reasons for questioning Jones' credibility, but with the utmost respect for the commission, those reasons do not support its decision. Instead of undermining Jones' credibility, the commission's findings take uncontested evidence and recite it in a way that is misleading. The commission was not required to believe Mr. Jones, but if it was going to call him a liar, it should give reasons that actually support that finding.

On the subject of medical treatment, the commission's decision gives no indication that it applied the proper test for determining whether Mr. Jones has reached MMI or whether he was entitled to additional medical care. Both of these questions are governed by standards that are relatively clear. With the utmost respect for the commission, if it is going to grant Warden & Smith's request to end this case, its decision must show it has applied the correct tests.

A. The Commission Based its Credibility Finding on the Testimony of Mr. Jones' Physicians, but Both of These Physicians Offered Explanations for Mr. Jones' Conduct, and Both of These Physicians Opined That Mr. Jones Was *Not* Lying.

The commission based its credibility finding on the deposition testimonies and records of Dr. Edwards and Dr. Healy. It recited that Jones had used a wheelchair and a walker even though neither physician had recommended these devices, it recited that both doctors believed that Jones was experiencing symptom "magnification," and it recited that both doctors believed that Jones' physical injury was fairly minor. See (App. Panel Or., p.5). The implication of this argument is that Jones was not being truthful with his doctors or, for that matter, with anyone. On this record, this finding was unreasonable.

- i. The commission based its credibility finding on Jones' use of a wheelchair, but no doctor ever advised Jones not to use a wheelchair.

The error in the commission's findings is that they take uncontested facts and divorce them from their context. For example, while it is absolutely true that both Dr. Edwards and Dr. Healy opined that Jones should not need to use a wheelchair or a walker, there is no evidence that either of these physicians ever communicated this to Mr. Jones.

This is an important point. Dr. Edwards saw Jones 4 times. The first was an independent medical evaluation, the second was to review Jones' MRI, the third occurred when Jones was admitted to the hospital following his epidural injection, and the fourth was when Dr. Edwards released him from his care. Dr. Edwards was deposed in December of 2011 and he said that he had *not* counseled Jones on using a walker, but that he *would* have advised against it *if* he had been Jones' treating physician. (Edwards Depo., p. 19, ll. 11-15; p.22, ll. 2-8). This was after the IME, after the MRI, and after Jones' hospitalization. The only thing that had not yet occurred is that Dr. Edwards had not yet met with Jones and told him that he had nothing to offer him. That meeting occurred 9 days later. One searches the record in vain for any mention of Dr. Edwards telling Jones that he should not use a walker or wheelchair. It is not there. See (APA pp.67-75) (Jones' records with Dr. Edwards).

Dr. Healy's testimony is no different. He saw Jones 3 times. The first was in the hospital in October of 2011. The second was in November for follow-up care, and the third was in April of 2012 for the same purpose. At no point do his records reflect that he told Jones not to use a wheelchair or a walker. See (APA, pp.94-96). It is hard to see why using these devices should impact Jones' credibility if nobody was telling him to avoid them.

There is a reason why neither of these physicians told Jones not to use a walker or wheelchair. Neither of these doctors have ever been what someone would call a primary care physician for Mr. Jones.

Warden & Smith did not admit this claim or authorize any treatment for Mr. Jones until *after* Dr. Edwards' deposition, and immediately as treatment with Dr. Edwards was authorized, Dr. Edwards released Jones from his care. The release has a perfectly reasonable explanation. Dr. Edwards is a spine surgeon, and everyone seems to agree that Jones has mechanical back pain but does not need surgery. See, e.g., (Healy Depo., p.29).

As for Dr. Healy, Warden & Smith allowed Jones to see him only once. Dr. Healy recommended tests and physical therapy, and he testified that these recommendations were have not been honored. (Healy Depo., pp.55, 66).

The point is this: while it was perfectly appropriate to note that both Dr. Healy and Dr. Edwards said that this sort of injury should not confine Jones to a wheelchair or a walker, it was inappropriate to use that testimony to undermine Jones' credibility. There is no evidence that either doctor shared this with Jones. Neither doctor has been "Jones' doctor."

- ii. In the same way, the remainder of the commission's credibility findings take uncontested facts and present them out of context.

All of the commission's credibility findings have similar defects.

Yes, both Dr. Edwards and Dr. Healy opined that Jones had symptom magnification. But both of these doctors also explained that this condition is not the same as someone lying about his or her symptoms. Dr. Edwards explained that magnification can be a psychological response to pain. He said that because therapy can be painful, the patient may fear that he

is damaging himself by engaging in painful activity. See (Edwards Depo., pp.29-30). Dr. Healy explained that magnification can be an emotional issue because ailing people who are not physicians often do not know what is wrong with them. (Healy Depo., pp.30-31). He gave an explanation that was similar to the explanation provided by Dr. Edwards; equating magnification with a psychological condition. See *Id.* at 37-38. At no point did either of these physicians use magnification to suggest that Jones was not credible or that he was misrepresenting his health. In using symptom magnification to cut against Jones' credibility, the commission was misstating the evidence.

The commission also recited Dr. Edwards' statement that most patients with this sort of back injury return to work within 7 days. (App. Panel Or., p.5). That is true—Dr. Edwards absolutely made this statement. But Dr. Edwards also opined, during the same deposition, that Jones was not able to work and that he should not be allowed to return to work until after he had a functional capacity evaluation or received physical therapy. (Edwards Depo., p.43). This deposition occurred six months after Jones' injury. The commission said that it was relying on Dr. Edwards' testimony at several points in its decision. Doing the opposite of what the doctor said is a curious form of reliance.

- iii. Both Dr. Edwards and Dr. Healy opined that Jones was being truthful; thus, the medical testimony does not support a reasonable inference that Jones was lying.

When they were asked directly, both Dr. Edwards and Dr. Healy opined that Mr. Jones was not lying about his health. Dr. Edwards was asked whether he had any concerns about whether Jones was being honest about his level of pain. He replied "Not really."

(Edwards Depo., p.32). He explained that he did not see any evidence that Jones was not being honest, that magnification was different from someone faking their symptoms, and that as to “faking,” he “[didn’t] think that was the case at all.” *Id.*

When Dr. Healy was asked whether he thought Jones was intentionally exaggerating or amplifying his symptoms, he replied “no.” (Healy Depo., pp.13-14). He explained that Jones might be suffering from a conversion disorder, which is a psychological phenomena, but that he did not get the feeling that Jones was pretending to be sick in order to avoid doing work. *Id.* Dr. Healy reiterated this opinion at the end of his deposition. *Id.* at 67-68.

It is extraordinarily difficult to challenge the commission’s factual findings. Under the Administrative Procedures Act, the commission’s findings must be clearly erroneous in order to be reversed. S.C. Code Ann. § 1-23-380(5)(f) (Supp. ____). Explaining the same principle a different way, the Supreme Court has described that the commission’s decision must have a “reasonable basis.” *Hutson v. South Carolina State Ports Auth.*, 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012). This principle is familiar to the Court. Like a jury’s findings in an action at law, the commission’s findings will be overturned only when those findings are so contrary to the evidence that they amount to an error of law.

That is what has happened here. The commission said that its decision was driven by the medical evidence and the deposition transcripts, but this evidence does not lend itself to more than one reasonable conclusion. All of the doctors seem to agree that Mr. Jones has a non-surgical back injury, but they also all seem to agree that he *is* experiencing pain. All of the doctors seem to agree that Jones is either experiencing more pain than he should be experiencing or that his response to his pain is greater than it should be, but at the same time,

no doctor—none—has opined that Jones' complaints are not credible. Indeed, both doctors have opined that they believe the opposite is true.

The commission does not have to believe Mr. Jones, and the commission does not have to believe these doctors. Doctors are not human lie detectors, and no one is suggesting that their testimony on credibility is entitled to conclusive weight.

But these professionals have spent more time with Jones than the hearing commissioner did, and if the commission is going to reject this testimony, it must at least have a cogent reason for doing so. There is a well-developed body of law recognizing that expert testimony is designed to aid the commission in finding the facts, but this same body of law also recognizes that when the commission disregards expert testimony, there must be other competent evidence in the record supporting the commission's finding. See, e.g., *Tiller v. Nat'l Health Care Center of Sumter*, 334 S.C. 333, 513 S.E.2d 843 (1999); and *Poston v. Southeastern Const. Co.*, 208 S.C. 35, 36 S.E.2d 858 (1946).

The Court should hold that there is no such evidence here. Instead, the commission has decided a credibility question by taking statements out of context and using those statements to support a speculative opinion. It is not reasonable to say that symptom magnification undermines Jones' credibility when both of the doctors have explained that this is not true, and it is not reasonable to say that Jones' use of a wheelchair undermines his credibility when no doctor has told him that he does not need to use one. Both doctors have viewed the medical evidence and opined that Jones is not playing sick and trying to avoid work. The commission's decision gives no cogent explanation for why it views the medical evidence differently.

B. There Is No Evidence That Jones Has Reached the Point of Maximum Medical Improvement, and Both Dr. Edwards and Dr. Healy Have Referenced Additional Treatment That Has Never Been Provided.

The commission found that Jones reached maximum medical improvement on the date of Dr. Healy's deposition. The commission also held that Jones was not entitled to any further medical treatment. (App. Panel Or., p.6). Neither finding is supported by this record. The commission's decision gives no indication that it applied the proper test for either of these questions, and because the commission is charged with using the proper standard to find these facts, the Court should remand this case with instructions that it do so.

- i. Additional medical care and maximum medical improvement are determined by specific tests.

The term "maximum medical improvement" describes the point at which someone's medical condition ceases to improve. It is commonly called a "plateau" in someone's care because when someone reaches MMI, there is no further treatment that will help cure that person's injury. See, e.g., *O'Banner v. Westinghouse Elec. Corp.*, 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995).

The test for additional medical care is different. The law allows someone to continue to receive medical care even though he or she has already reached MMI. The test is whether future medical care will lessen the injured person's "period of disability." *Dodge v. Brucoli, Clark, Layman, Inc.*, 334 S.C. 574, 580-82, 514 S.E.2d 593, 596-97 (Ct. App. 1999) (reversing the decision that medical care ends at MMI). Thus, there are two ways for someone to be entitled to medical treatment. If medical treatment will help someone's injury improve, that person is entitled to such care because he or she is not at MMI. If medical

treatment will *not* change the person's injury, but will nevertheless help alleviate his or her symptoms, that person will generally be entitled to that treatment notwithstanding the fact that he or she is at MMI. See, e.g., *Pearson v. JPS Converter & Indus. Corp.*, 327 S.C. 393, 397, 489 S.E.2d 219, 221 (Ct. App. 1997) (describing these principles).

- ii. The commission did not apply these tests, and the uncontested evidence is that Jones needs additional treatment and is not at MMI.

The commission's decision does not suggest that it applied either of these tests.

As to MMI, the commission said that both Dr. Healy and Dr. Edwards had indicated that they had nothing further to offer Mr. Jones. (App. Panel Or., p.6). That is not the test. Dr. Edwards is a back surgeon. Unless Jones is a candidate for surgery, Jones would have no need for Dr. Edwards. Dr. Healy is a neurologist. Unless Jones has a neurological disorder, Jones would have little need for Dr. Healy. But Jones is not at MMI just because Dr. Healy and Dr. Edwards cannot help him. If Jones needed physical therapy or mental treatment from a psychiatrist, Dr. Healy and Dr. Edwards would not provide these services.

As to medical treatment, the commission's finding is stranger. The commission gave no rationale whatsoever for the decision that Jones did not need any future medical care. *Id.* The commission simply recited that its finding was based on the medical evidence. The only logical basis for this finding was the commission's view that Jones was not credible. If the commission believed that Jones was not truly hurt, it logically follows that the commission believed Jones was not entitled to any future medical treatment.

Here again, the problem is that the medical evidence is uncontradicted and does not lead to more than one reasonable inference. In their depositions, both Dr. Edwards and Dr.

Healy were asked whether they believed Jones was at MMI. Both doctors answered “no.” Dr. Edwards was deposed on December 6, 2011. This was 9 days before Warden & Smith claimed that Jones reached MMI. Dr. Edwards opined that Jones needed “vigorous therapy” (Edwards Depo., p.30), that he was not at MMI, *id.* at 49, and that until Jones had a functional capacity evaluation or physical therapy, he would not allow him to work. *Id.* at 43. There is not more than one way to read this testimony. It is not equivocal.

Dr. Healy’s testimony was similar. He was deposed in June of 2012. This was 2 days before the hearing with the single commissioner. Dr. Healy testified that he believed Jones needed electrical studies and physical therapy, (Healy, pp.46-47), that Jones was not at MMI, and that Jones had not been at MMI when Dr. Healy had seen him in April. *Id.* at 48. Here again, there is not more than one way to read this testimony. It is not equivocal.

Warden & Smith will combat this in 2 ways. It will say that Dr. Edwards released Jones from his care and that this release made no mention of physical therapy. Then, it will attack Dr. Healy’s testimony by saying that Dr. Healy’s opinion relies on taking Jones’ complaints at face value. In other words, because Jones is a liar (and he is not), Dr. Healy’s opinions do not matter.

This record does not allow a reasonable person to take these views. Dr. Edwards is a spine surgeon, not a therapist. He made at least 5 references to physical therapy during his deposition, and during this same deposition, he specifically opined that Jones could not return to work and was not at MMI. It is absurd to think that he changed his view 9 days later. Jones did not have any treatment in the interim. Dr. Healy said that the omission of therapy from Dr. Edwards’ release may have been inadvertent. (Healy Depo., p.55).

As to Dr. Healy's opinions, the commission did not discredit them—it *relied* on them. The commission repeatedly recited that its decision was driven by the medical evidence and the deposition testimony of Dr. Edwards and Dr. Healy, and Dr. Healy's testimony is relatively clear. He said that Jones was not at MMI and that Jones needed physical therapy. (Healy, pp.48, 55). It was not possible for the commission to rely on Dr. Healy's testimony while reaching the conclusion that Jones did not need additional treatment and that he was fit to return to work. This was the exact opposite of the doctor's opinion.

- iii. It is possible that Warden & Smith is seeking to benefit from controlling Jones' medical care but failing to give him any options.

The circumstances of this case may illustrate an issue that commonly arises in workers' compensation cases. The law generally gives the employer the right to direct an injured worker's medical care. See *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 113-14, 576 S.E.2d 191, 197-98 (Ct. App. 2003) (discussing and citing the relevant statute). This is not an issue as long as the employer and the injured worker see things the same way, but if the employer is denying the case, or if the employer is refusing to provide the injured worker with medical care, the injured worker is left to choose between imperfect options.

If the injured worker seeks care on his own, he will have to prove that doing so was justified because his employer was not giving him any alternative. See *Hall v. United Rentals, Inc.*, 371 S.C. 69, 86-87, 636 S.E.2d 876, 885-86 (Ct. App. 2006). If he does *not* seek care on his own, or if he is refused care through his own health insurance because his ailment is the result of a work-related injury, he faces the argument that he is not truly injured. Cf. *Martin v. Rapid Plumbing*, 369 S.C. 278, 292, 631 S.E.2d 547, 555 (Ct. App.

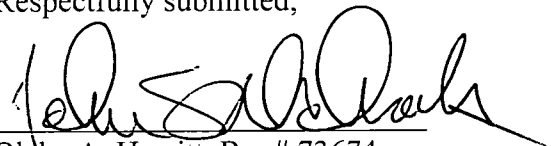
2006) (“This is not a case where an employee is refusing treatment offered by an employer. Rather, this is a situation where the employee feels he still needs treatment and the employer fails to provide it.”). This concern runs throughout this record—there is no other reasonable conclusion. As Jones told the hearing commissioner, he was willing to do what a doctor told him to do; he just needed to see a doctor. (Tr. of June 28 Hr’g, pp.16-17).

CONCLUSION

The commission’s credibility findings took uncontested evidence and recited it in a way that was misleading. The commission’s decision also gave no indication that it applied the proper test for MMI or additional medical care, and the fact of the matter is that although the commission said that it was basing its decision on the medical evidence, all of the doctors said that they believed Mr. Jones’ complaints and that he could *not* work. These errors make the commission’s decision clearly erroneous, and because the decision is clearly erroneous, this Court should reverse this case and remand it for additional proceedings.

September 27, 2013

Respectfully submitted,



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