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 REPLY BRIEF

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ARGUMENT

Every section and argument in David Jones' principal brief was written to be deliberate and accurate. Mr. Jones has not misrepresented anything; he seeks only to characterize the evidence fairly and to describe the decision below with precision. With the utmost respect for the commission, the problem with its decision is that its reasoning cannot be squared with the evidence in the record. And with the utmost respect for Warden & Smith, it's brief promises certainty and clarity that it cannot deliver.

The deposition transcripts are included in the record and can speak for themselves, but the salient facts for this appeal should be these: when they were asked directly, *both* of Mr. Jones' doctors said that he needed additional treatment, *both* of Mr. Jones' doctors said that they believed his complaints of pain, and *both* of Mr. Jones' doctors opined that Mr. Jones was not currently capable of working. The commission said that its decision was driven by this testimony, but given the contents of this testimony, that cannot be true.

i. Both parties have called this an "admitted" injury, but it really is not. If Mr. Jones is not credible, none of this claim is valid and all of it has been a lie.

Warden & Smith says that this is an admitted accident. To be fair, Mr. Jones' principal brief said the same thing. But Warden & Smith also says that the issue in this case is whether Mr. Jones' complaints of pain match up with the objective findings of his physicians, and with the utmost respect for Warden & Smith, that statement is inaccurate.

Everyone has always agreed that Mr. Jones' back injury is fairly minor. In fact, Warden & Smith's original theory for denying this case was that the MRI from Mr. Jones' current injury was no different from the MRI after his 2007 injury. See, e.g., (Edwards

Depo., p.12, line 13 - p.13, line 3).[1] The issue is not whether Mr. Jones' pain is consistent with the severity of his back injury—everyone knows that the answer is "no." Instead, the question is whether Mr. Jones is really experiencing the pain that he says he is experiencing, whether Mr. Jones thinks his pain is worse than it actually is, or whether Mr. Jones is lying.

This distinction is important because the only treatment Mr. Jones has ever received has been focused on relieving his pain, not fixing a physical deficiency in his back. Mr. Jones has received an epidural steroid injection, pain medication, and he was treated while he was hospitalized for spinal headaches. That is all. Dr. Edwards agreed with the statement that Mr. Jones' problem is a "pain issue," and that just because Mr. Jones is not a candidate for surgery, this does not mean that Mr. Jones is not experiencing painful symptoms. (Edwards Depo., p.31, line 15 - p.32, line 11). When Dr. Edwards released Mr. Jones from his care, he released him with a prescription for pain medicine. See (APA, p.73). Warden & Smith told the commission that Mr. Jones had multiple refills of this medicine, but unless the record is mistaken, that statement was not true. Warden & Smith said that Jones had over 40 refills, see (Tr. of June 28 Hr'g, p.29, lines 17-22) and (*id.*, at 55, lines 10-25) but the medical record lists one refill of one medicine and no refills of the rest. (APA., p.73).

Here is the point: if Mr. Jones is lying about his pain, Mr. Jones did not need *any* pain medicine and he did not need *any* steroid injections. This is not really an admitted injury. This claim has only ever been about Mr. Jones' pain, and Warden & Smith says that this whole story is a farce. If that argument is right, nothing in this claim was compensable.

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[1]Mr. Jones previously injured his back in 2007 when a roof collapsed on him while he was working as a volunteer fireman. See (Tr. of June 28 Hr'g, p.10, line 13 - p.11, line 1; p.18, lines 9-17).

ii. The reason Mr. Jones' principal brief did not focus on his own testimony was because the commission said that its decision was driven by the medical evidence.

Warden & Smith says that the testimony of Mr. Jones and his wife is the most compelling evidence that supports the commission's finding that Mr. Jones was not credible.

The commission's credibility finding is finding of fact number 2 and appears on page __ of the record. This finding never mentions Mr. Jones' wife. As to Mr. Jones' testimony, it recites only that Mr. Jones claims to be unable to shave and that he (supposedly) has not sought pain medication. The bulk of this paragraph is focused on Dr. Edwards' testimony, Dr. Healy's testimony, and things like symptom exaggeration, Mr. Jones' use of a wheelchair, and the fact that Mr. Jones' level of pain is out of proportion to what it should be. There is a reason that Mr. Jones' principal brief did not focus on his or his wife's testimony. The commission's decision did not seem to be based on it.

But if the Court is inclined to consider this testimony, it should consider all of it and not just the part that Warden & Smith wants to emphasize. For Warden & Smith's theory of the case to work, not only must Mr. Jones be lying about his pain, he must also be lying about having difficulty getting medical care and not being able to afford the co-pays required to seek treatment on his own. As for Mr. Jones' wife, she must be lying about the changes in Mr. Jones' mood, the fact that she and Mr. Jones were turned away *both* times they sought physical therapy, and the fact that they were told they could not use their own health insurance because this was a work-related injury. (Tr. of June 28 Hr'g, pp.47-54). It may be hypothetically possible for this entire narrative to be false, but the record does not appear to contain any principled justification for this sort of conclusion.

Mr. Jones continues to be at a loss to understand how his credibility can be impacted by the fact that he has an exaggerated response to pain or by his use of a walker or a wheelchair. Everyone agrees that Mr. Jones' response to pain is worse than it should be—this proves nothing. As to the use of walker or wheelchair, no medical doctor seems to have told Mr. Jones that he should refrain from using an assistive device even though he feels like he is in need of one. This reasoning is circular, and the Court should reject it.

The bottom line ought to be this: Dr. Edwards was presumably familiar with his records and his experience with this patient, and when Dr. Edwards was directly asked whether he had any concerns that Mr. Jones was being honest about his level of pain, his reply was "Not really. I mean, there are some things that we can pick up on our exam to give us some idea that patients are not being honest. And I didn't see any of that with him." (Edwards Depo., p.32, lines 2-11). Dr. Healy's view was similar, see (Healy Depo., p.13, line 25 - p.14, line 7), and both men opined that in his present condition, Mr. Jones is unable to work. See (Edwards Depo, p.43, lines 10-14); and (Healy Depo., p.48, lines 10-13). Nobody is saying that these opinions are entitled to conclusive weight, but if both doctors are offering the same opinion, it is hard to see how it is reasonable for a layman to view the medical evidence differently. This Court's decision in *Burnette v. City of Greenville* involved a medical opinion that was improper because it emanated from a commissioner and not a doctor. 401 S.C. 417, 428, 737 S.E.2d 200, 206 (Ct. App. 2012). This case is not identical, but it seems comparable. As Mr. Jones' principal brief described, the commission's credibility finding was arbitrary. The commission did not have to believe Mr. Jones' story, but if it was going to disbelieve him, it had to give reasons that make sense.

iii. The commission never listed the standard for maximum medical improvement and its finding on MMI misstates the evidence.

As Mr. Jones' principal brief described, maximum medical improvement is determined by a test. Someone reaches MMI when his or her medical condition has reached a plateau and no further treatment will help cure the injury at issue. See, e.g., *O'Banner v. Westinghouse Elec. Corp.*, 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995).

The commission never articulated this test. It recited that both Dr. Edwards and Dr. Healy believe that they have nothing further to offer Mr. Jones, but that is not the standard. The commission's decisions must consist of more than recited facts and evidentiary findings. The commission's decisions must be sufficiently detailed to allow a reviewing court to determine whether the factual findings are supported by the evidence and whether the law was properly applied to those findings. *Able Communications v. South Carolina Pub. Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986). This decision does not meet that standard. Suppose that the commission did not apply the appropriate test for MMI but used some other guideline. The commission's order does not give an indication either way.

The other defect on this issue is that this theory of the evidence cannot withstand meaningful scrutiny. The evidence in the record forecloses it.

Dr. Edwards was deposed on December 6, 2011. During that deposition, he opined that Mr. Jones was not at MMI, needed "aggressive" therapy, and was unable to work. (Edwards Depo., p.39, l. 14 - p.40, l. 8; 43, ll. 10-14; and p.49, ll. 16-18). This was not the first time Dr. Edwards mentioned therapy. In his order for the steroid injection, he noted that "aggressive therapy" would be "required" before Mr. Jones would reach MMI. (APA, p.69).

Nine days after his deposition, Dr. Edwards released Mr. Jones from his care. His notes from that exam reflect Mr. Jones' chief complaint as back pain and weakness in both of his legs, and his notes further record that Mr. Jones' examination is "[u]nchanged from before." (APA, p.73). Surely the argument is not that Dr. Edwards changed his opinion in the nine days between his deposition and Mr. Jones' last visit. Mr. Jones did not receive any treatment in the interim, and Dr. Edwards' report notes no improvement.

This same report indicates that Dr. Edwards' did not see a problem with Mr. Jones that could be dealt with medically or surgically. (APA, p.74). Dr. Healy agreed with this statement, see (Healy Depo., p.20, line 19 - p.21, line 6), and in the same deposition, Dr. Healy insisted that Mr. Jones could not work, was not at MMI, and needed physical therapy. (*Id.*, at 48, 55, and 67). It is hard to see how this testimony can be viewed in multiple ways. The Court can determine the question for itself, but this testimony does not seem equivocal.

iv. The reason Mr. Jones did not present additional expert medical evidence was because all of the doctors who offered evidence and testimony agreed with him.

Warden & Smith chides Mr. Jones for allegedly failing to secure expert testimony that he needs more medical treatment. Here again, the Court should reject this argument.

As was the case with the commission's MMI finding, the commission never articulated the test for additional medical treatment. The commission did not recite the standard, the case containing the standard, or the relevant statute. And to the extent Warden & Smith argues that the medical opinions in this case are equivocal in some way, Mr. Jones would direct the Court's attention to the testimony itself. Dr. Edwards explained that he would not allow Mr. Jones to work until after completing a functional capacity evaluation

or physical therapy. (Edwards Depo., p.43). Dr. Healy agreed that Mr. Jones needed physical therapy. (Healy Depo., p.55). Mr. Jones never received physical therapy or a functional capacity evaluation. Instead, the commission determined that he has a 7% rating to his back and is fit to work. On this record, these findings were unreasonable.

CONCLUSION

The commission's credibility findings took uncontested evidence and recited it in a way that was misleading. David Jones is willing to do whatever a doctor tells him to do—he just needs his employer to send him to a doctor. The commission's decision gives no indication that it applied the proper test for MMI or additional medical care, and although the commission said that it was basing its decision on the medical evidence, the doctors in this case said that they believed Mr. Jones' complaints and that he could *not* work. This Court should reverse the commission's decision and remand this case. With the utmost respect for the commission, its decision in this case is clearly erroneous.

Respectfully submitted,

January 17, 2014

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondents with a copy of the *Initial Reply Brief* by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

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