

5

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

APPELLATE CASE NO. 2014-000943

PATRICIA MARZETTAPPELLANT,

v.

CHARLESTON COUNTY SCHOOL DISTRICTRESPONDENT.

INITIAL BRIEF OF APPELLANT

Donald H. Howe
Law Offices of Donald H. Howe, LLC
SC Bar#002690
818 Wappoo Road
Post Office Box 31324
Charleston, SC 29417

Attorney for Appellant
Patricia Marzett

RECEIVED

AUG 11 2014

SC Court of Appeals

TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities	ii
Statement of Issues on Appeal.....	iii
Statement of the Case.....	1
Statement of Facts.....	1
Argument	
I. The S. C. Workers' Compensation Commission erred as a matter of law in finding that Claimant/Appellant's need for a hip replacement was not related to her work accident of February 2006.....	2
(a) Standard of Review.....	2
(b) The treating orthopedic hip specialist, Dr. Merrill, never opined that the need for surgery was <u>not</u> related to the accident.....	3
(c) The evidence is clear as a matter of law that Claimant/Appellant's need for a hip replacement is causally connected to her work-related injury of February 2006.....	5
II. The S. C. Workers' Compensation commission erred in basing its disability award for Claimant/Appellant's hip on the 7% impairment rating rendered December 8, 2009 rather than the 15% rating rendered July 31, 2012.....	8
Conclusion	9
Certificate of Counsel	

TABLE OF AUTHORITIES

CASES	PAGES
<u>Ballenger v. Southern Worsted Corp.</u> , 209 S.C. 463, 40 S.E.2d 681 (1991).....	5
<u>Grice v. Dickerson, Inc.</u> , 241 S.C. 225, 127 S.E.2d 772 (1962).....	5
<u>Hargrove v. Titan Textile</u> , 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2009).....	3
<u>Tiller v. National Health Care Center</u> , 334 S.C. 333, 513 S.E.2d 843 (1999).....	5
STATUTES	
S.C. Code Ann. §42-9-30(17).....	9

STATEMENT OF ISSUES ON APPEAL

- I. The S. C. Workers' Compensation Commission erred as a matter of law in finding that Claimant/Appellant's need for a hip replacement was not related to her work accident of February 2006.
- II. The S. C. Workers' Compensation commission erred in basing its disability award for Claimant/Appellant's hip on the 7% impairment rating rendered December 8, 2009 rather than the 15% rating rendered July 31, 2012.

STATEMENT OF THE CASE

This is an appeal from the South Carolina Workers' Compensation Commission. The original hearing was held on August 19, 2013 pursuant to a Form 50 filed by Claimant/Appellant. The hearing was held by Commissioner Avery B. Wilkerson who issued his order on September 20, 2013. Claimant/Appellant appealed and a hearing before a three Commissioner panel was held on January 21, 2014. The three Commissioner panel affirmed the order of the single Commissioner by order dated March 27, 2014. This appeal follows.

STATEMENT OF FACTS

The Claimant/Appellant was a school teacher who was injured in connection with breaking up a fight between students on February 21, 2006. The Claimant/Appellant suffered admitted injuries to her back, knee, and hip. Claimant was originally seen and did follow-up with a Doctor's Care facility that consistently noted her complaints of hip pain (the specifics are outlined in more detail below). Her hip problems continued and were significant enough to cause her to stumble at work as she descended stairs on September 24, 2007. (APA 54).

In addition to the doctors at Doctor's Care, Claimant ultimately saw a variety of specialists. The first medical specialist Claimant/Appellant saw was Dr. James Aymond, to whom she was primarily referred for her back, though he also noted hip problems. The second medical specialist Claimant/Appellant saw was Dr. John Graham who saw her primarily for her knee, although he also noted that the hip injury was still "an active concern." (APA 65).

It was not until June 24, 2009 (three years and four months after the accident) that Claimant/Appellant saw a specialist for her hip. That doctor was Dr. Keith Merrill. Dr. Merrill had a follow-up appointment six months later on December 8, 2009 at which time he found her to be at maximum medical improvement. He assigned a 7% impairment rating and noted "(s)he

could possibly need surgery including a hip arthroscopy and/or tronchanteric bursectomy.” (APA 88).

Claimant/Appellant next saw Dr. Merrill on July 31, 2012, at which time he stated in his office note: “I believe Patricia most probably will require a total hip joint replacement. Her x-ray confirms some underlying disease that was exacerbated by her fall. I do not believe an arthorscopy and bursectomy would work.” (APA 92). He also prepared a Form 14B in which he causally connected the need for a hip replacement to her work-related injury. He also increased her impairment rating from 7% to 15%. (APA 93).

At his deposition on August 13, 2013 (six days before the hearing), Dr. Merrill arguably “equivocated” on his earlier opinion about the need for hip surgery (and increased impairment rating) being related to the work-related accident. It is the nature and extent of this “equivocation” that underlies the subject of this appeal. It is of note, however, that both the single Commissioner and the three Commissioner Panel held that “Dr. Merrill testified to a reasonable degree of medical certainty that the Claimant’s current condition is not related to her work accident of 2006.” (Order/Wilkerson Page 17/Finding #21).

ARGUMENT

I. The S. C. Workers’ Compensation Commission erred as a matter of law in finding that Claimant/Appellant’s need for a hip replacement was not related to her work accident of February 2006.

(a) Standard of Review

On questions of fact, the conclusion of the three Commissioner Panel is generally presumed to be correct. If, however, the conclusion can be shown to be clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, then the conclusion may be overturned. Substantial evidence is that which would allow reasonable minds to reach

the same conclusion of the Workers' Compensation Commission Panel. Hargrove v. Titan Textile, 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2009).

(b) **The treating orthopedic hip specialist, Dr. Merrill, never opined that the need for surgery was not related to the accident.**

Despite the finding of fact by the Commission, Dr. Merrill never opined that the need for hip replacement surgery and the increased impairment were not related to the accident to a reasonable degree of medical certainty. The specific question Dr. Merrill was asked was:

Q. Okay. Now, with the limited information that we have, are you able to say to a reasonable degree of medical certainty that her change of condition from December 2009 to July of 2012 is directly related to her accident of February 21st, 2006? (Depo 12).

To which he replied "No." (Depo 13).

Dr. Merrill qualified his answer as the deposition continued.

Claimant believes that the Commission misread the proper context of Dr. Merrill's deposition testimony on this issue. Dr. Merrill clarified his response quoted above as follows:

Q. Okay. And if, in fact, she was getting along and not having hip trouble and then develops hip trouble, is that the straw that breaks the camel's back for somebody like her?

A. Yes.

* * * * *

A. The whole hypothesis that the exacerbation was truly created by the fall is a little bit of a leap of faith.

Q. Okay. And - -

A. Based on a person telling me that's the way things started.

Q. Okay.

A. And our system of workers' compensation that the exacerbation, the word exacerbation and there's no way for me to say, well, no, it didn't exacerbate it. So, therefore, it exacerbated it.

Q. Okay.

A. And that's based historically on what brought her to the attention of Dr. Aymond.

Q. Right. Okay. And I'm just making sure I'm communicating with you. So, I guess, assuming, if we can assume her history is correct that she was walking around getting along fine and not having any pain and it wasn't until after this fall that she had the pain, if you'd assume that to be correct, can you then say that to a reasonable degree of medical certainty that problems that she's having now in her hip were exacerbated to some extent by the fall?

A. Yes.

(Deposition Page 17, line 17; Page 18, line 2; and Page 20 , lines 4-21)

In essence, Dr. Merrill said his opinion would "boil down" to whether or not he could assume her history of being symptom free in her right hip prior to the accident was accurate. If he could assume that she had no prior hip problems, then he could, and indeed did, relate the additional surgery to the accident.

Claimant/Appellant submits that there is a significant difference between what the doctor testified to (I cannot state to a reasonable degree of medical certainty based on the limited information before me...) and what the Commission *concluded* he said (I can state to a reasonable degree of medical certainty that the accident is not related to the need for surgery).

To a layman untrained in the differences in language and burdens of proof, the difference may not be discernable. To one trained in the law, however, the difference is quite significant.

The reason the difference is so significant is that if one hears “the doctor said there was no connection” then there is no need to consider additional evidence. On the other hand, if one hears “I can’t say based on what’s before me at present” then the fact finder is invited, indeed compelled, to consider additional factors that the doctor identifies as relevant and significant.

The South Carolina Courts have recognized that an expert medical opinion is not required to establish causation in a workers’ compensation case. Tiller v. National Health Care Center, 334 S.C. 333, 339, 513 S.E.2d 843, 846 (1999). Indeed, lay testimony has been allowed to refute expert medical testimony. Ballenger v. Southern Worsted Corp., 209 S.C. 463, 469, 40 S.E.2d 681, 684 (1991). As in this case “[i]f a medical expert is unwilling to state with certainty a connection between an accident and an injury, the ‘expression of a cautious opinion’ may support an award if there are facts outside the medical testimony that also support an award.” Tiller, 334 S.C. at 340, 513 S.E.2d at 846 (citing Grice v. Dickerson, Inc., 241 S.C. 225, 127 S.E.2d 772 (1962)).

(c) The evidence is clear as a matter of law that Claimant/Appellant’s need for a hip replacement is causally connected to her work-related injury of February 2006.

There is not one shred of evidence that the Claimant suffered even the slightest problem with her right hip prior to the accident. Also, because Dr. Merrill did not see Claimant until June 24, 2009 (Deposition Page 4, lines 19-20), over three years after the accident, it is not surprising that he was “cautious” about assuming much about Claimant’s prior history.

As noted, there is no medical (or non-medical) evidence of prior hip problems. By contrast, a review of the medical records of the physicians that did treat Ms. Marzett after the accident demonstrates as follows:

Date of Accident	Date of Accident		
2/23/06	Drs. Care	“(R) hip pain”	(APA 3)
2/28/06	Drs. Care	“hip and back contusion”	(APA 4)
2/28/06	Drs. Care	“hip still painful” “back hip contusion”	(APA 5)
3/6/06	Drs. Care	“hip contusion” “hip/back pain”	(APA 6) (APA 7)
4/12/06	Drs. Care	“R hip contusion”	(APA 9)
4/12/06	Drs. Care	“hip hurts when standing too long/ Also when getting up”	(APA 10)
4/18/06	Drs. Care	“Diagnosis: right hip injury”	(APA 12)
7/19/06	Drs. Care	“Diagnosis: hip contusion, unre- mitting pain”	(APA 15)
7/27/06	Progressive PT	“R hip pain s/p fall, c sitting/ Standing & walking>30”	(APA 26)
9/14/06	Progressive PT	“still hurts sitting & standing>1 hr	
11/29/07	Radiology Associates	“The superior labrum is truncated with marked deformity anteriorly felt to be consistent with a fairly complex tear	(APA 44)

It is important to note that Ms. Marzett continued to work throughout her recovery. She never received any temporary total benefits. Indeed, in 2007 she received an award for Teacher of the Year at her school. The next year, the teacher for whom she was the assigned mentor received that award. (Transcript of Hearing, Pages 37-38). Thus, to the extent any “wear and tear” may have aggravated her recovery, most of that “wear and tear” would have

come from her work duties - - such as the stairs she had to climb and descend with her bad back and hip at work. (See Exhibit 4/Hearing Transcript, Page 49, lines 18-25):

Q. Okay. And you kept working every day even in a job that required you to use stairs every day and do a lot of bending to reach third grader's desks?

A. You - - I - - what's the question?

Q. Did your job require you to use stairs every day?

A. Yes.

Q. And you had to do a lot of bending over?

A. Yes.

One particular factor that gave Dr. Merrill hesitation in causally connecting Ms. Marzett's hip "joint" injury was his mistaken belief that there were no bursitis-like symptoms in the area of her hip (Merrill Deposition Page 7, lines 20-22). Yet, contrary to Dr. Merrill's assumption, Dr. Aymond (eighteen months prior to Claimant's referral to Dr. Merrill) specifically noted bursitis-like symptoms in Claimant/Appellant's hip in his office note of December 14, 2007: "There is no evidence of iliopsoas or trochanteric bursitis by plain film, although this is the area of her lateral hip that does give her pain" (emphasis added). (APA 58).

Lastly, Dr. Merrill completed two separate Form 14-B's: one dated December 8, 2009 and the other dated October 12, 2012. The second form called for a hip replacement and gave a 15% impairment. This is the form the Hearing Commissioner disregarded. It is important, however, to note that even on the December 2009 Form 14-B, Dr. Merrill opined the need for "possible surgery including arthroscopy and bursectomy" (See Exhibit 3/APA 109) related to her accident. The need for additional hip surgery was therefore always a reasonable possibility. It was only the extent of the surgery that changed.

In sum:

- 1) Dr. Merrill testified that he would indeed causally relate the need for a future hip replacement to the accident if he could assume that Claimant was having no problems prior to the accident.
- 2) There is no evidence, medical or non-medical, of Claimant having even the slightest problem with her hip prior to the accident.
- 3) There is a plethora of evidence that Claimant suffered serious and continuous problems with her hip after her work-related accident.
- 4) There is specific evidence of “bursitis-like” symptoms arising after the accident.
- 5) There is no evidence of any non-work-related subsequent traumatic incident or wear and tear that would constitute an independent intervening injury to her “hip joint.” To the contrary, Claimant’s work environment required daily use of stairs and bending.
- 6) The possible need for some type of hip surgery was always acknowledged by the treating physician.

Taking the testimony of Dr. Merrill as a whole (and in context of the medical records of the various medical providers who examined Ms. Marzett prior to Dr. Merrill), Claimant submits that the injury to her hip joint was in fact causally related to her injury at work as a matter of law based on the record of the case.

II. The S. C. Workers’ Compensation commission erred in basing its disability award for Claimant/Appellant’s hip on the 7% impairment rating rendered December 8, 2009 rather than the 15% rating rendered July 31, 2012.

As indicated above, in his office note and in the 14-B form (both dated July 31, 2012), Dr. Merrill assigned a 15% impairment rating to the Claimant/Appellant. Should this Court

agree with Claimant/Appellant's Argument I above, then the disability award pursuant to S.C. Code Ann. §42-9-30(17) should be re-evaluated based on an underlying impairment rating of 15% (rendered July 31, 2012) rather than 7% (rendered December 8, 2009).

CONCLUSION

For the reasons outlined above, Claimant submits that she is entitled to have her future hip replacement surgery paid for by the Employer/Respondent and that the case be remanded to determine her rate of disability based on an impairment of 15% pursuant to S.C. Code Ann. §42-9-30(17).

Respectfully submitted,

Date:

Aug 7, 2014

Donald H. Howe

DONALD H. HOWE, ESQUIRE
LAW OFFICES OF DONALD H. HOWE, LLC
Post Office Box 31324
Charleston, SC 29417
SC Bar#2690
ATTORNEY FOR CLAIMANT/APPELLANT

RECEIVED
AUG 11 2014
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
SOUTH CAROLINA COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

APPELLATE CASE NO. 2014-000943

PATRICIA MARZETT.....Appellant

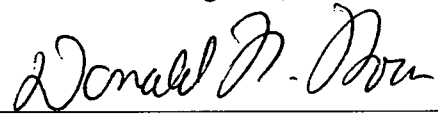
v.

CHARLESTON COUNTY SCHOOL DISTRICT.....Respondent

CERTIFICATE OF SERVICE

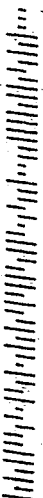
I certify that I have served the Respondent with the Appellant's Initial Brief by hand-delivering a copy of it addressed to the attorney of record, Catherine H. Chase, Esquire, Young Clement Rivers, LLP, 25 Calhoun Street, Charleston, SC 29401 on August 7, 2014.

August 7, 2014



DONALD H. HOWE
Law Offices of Donald H. Howe, LLC
SC BAR#002690
818 Wappoo Road
Post Office Box 31324
Charleston, SC 29417

Attorney for Appellant
Patricia Marzett



LAW OFFICES OF DONALD H. HOWE, LLC

Sherrings and Fann

818 WAPPOO ROAD, CHARLESTON, S.C. 29407
P.O. BOX 31324, CHARLESTON, S.C. 29417

Honorable Jenny Abbott Kitchings
Clerk, S. C. Court of Appeals
PO Box 11629
Columbia, SC 29211

RECEIVED

AUG 11 2014

SC Court of Appeals

