

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission
Appellate Panel

Trial Court Case No. 1205879

RECEIVED

AUG 10 2015

SC Court of Appeals

 James Dent, Employee,Appellant,

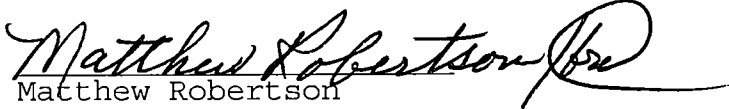
v.

East Richland County Public Service District, Employer, and
State Accident Fund,
Carrier, Respondents.

NOTICE OF APPEAL

James Dent appeals the Order of the SC Workers' Compensation
Commission Appellate Panel dated July 10, 2015. Appellant
received written notice of entry of this Order on July 10,
2015. Grounds for Appeal are attached hereto.

August 10, 2014



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Attorney for Respondent

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State Accident Fund,
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PROOF OF SERVICE

I certify that I have served the NOTICE OF APPEAL on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on August 10, 2015, addressed to its attorney of record, Page P. Snyder, State Accident Fund at Post Office Box 102100, Columbia, South Carolina 29221-5000.



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Attorney for Appellant

GROUND FOR APPEAL

1. Did the Commission err in failing to find that claimant's left leg is an affected body part in addition to his right leg, the error being that the preponderance of the evidence shows that claimant's left leg is affected as well as his right leg?
2. Did the Commission err in failing to find that claimant's left leg is an affected body part in addition to his right leg insofar the Commission completely bases its finding on evidence as follows, "Claimant's IME report is devoid of any mention to the left leg, other than the fact that there is no deficit (Claimant's APA #4 in its entirety)", the error being that throughout her Order, the Commission cites the Claimant's IME as a basis for her findings but lends weight **only** to those portions of the claimant's IME report which she construes as negative to the claimant's case, when the IME doctor's report should be found either credible or lacking in credibility in its entirety?
3. Did the Commission err in finding that "One month after the date of the accident, Claimant's pain radiation was better", the error being that this finding is not supported by substantial the evidence in the record?
4. Did the Commission err in finding that "One month after the date of the accident, Claimant's pain radiation was better", the error being that this finding is inconsistent with the Commission's finding of fact #1 in which it finds that the claimant's right leg has been affected by the admitted injury to his back?
5. Did the Commission err in finding that "Physical therapy records state (twice) that Claimant's back pain is 'intermittent.' 'Constant' is a choice that was not checked ", the error being that this finding implies a conclusion that the claimant's current back pain is "intermittent" rather than constant, and such implied finding is not supported by substantial the evidence in the record?
6. Did the Commission err as a matter of law in finding that "Physical therapy records state (twice) that Claimant's back pain is 'intermittent.' 'Constant' is a choice that was not checked ", the error being that this finding implies a conclusion that the claimant's current back pain is "intermittent" rather than constant, and the Commission may not rely upon implied findings of fact to support its decisions?
7. Did the Commission err in finding that "Prior to reaching maximum medical improvement for the work injury, Claimant had already determined that he was not planning to return to work because of lung cancer (listed first) and his back injury ", the error being that the finding that Claimant had determined he was not planning to return to work "**because of lung cancer**" is not supported by substantial the evidence in the record?

8. Did the Commission err in finding that "Prior to reaching maximum medical improvement for the work injury, Claimant had already determined that he was not planning to return to work because of lung cancer (listed first) and his back injury", the error being that the finding that Claimant had determined he was not planning to return to work "**because of lung cancer**" is based solely on the fact that lung cancer was "listed first" and as such is supported by **no clear evidence in the record**; therefore, the finding is based **purely** on surmise, conjecture and speculation by the Commission?
9. Did the Commission err in finding that "Prior to reaching maximum medical improvement for the work injury, Claimant had already determined that he was not planning to return to work because of lung cancer . . .", the error being that this finding is not supported by substantial the evidence in the record and the **only** expert evidence in the record concerning the claimant's lung cancer is Dr. Forrest's opinion that the claimant is sufficiently disabled by his back injury to be judged permanently and totally disabled irrespective of his lung cancer and the claimant's testimony that his lung cancer is now in remission and not a factor in his inability to return to work?
10. Did the Commission err in finding "We do find it inconsistent that Claimant would complain of "8," pain on "average" (meaning his pain goes even higher), but tell Dr. Gunter that he would "not consider" surgery if offered; Claimant also told physical therapy personnel (to whom Claimant complained of "9" pain) that he "does not want" to have surgery. Even though Claimant testified that his cancer is in remission, Claimant has not expressed an interest in undergoing surgery", the error being that this finding is not supported by substantial the evidence in the record?
11. Did the Commission err in finding "I do find it inconsistent that Claimant would complain of "8," pain on "average" (meaning his pain goes even higher), but tell Dr. Gunter that he would "not consider" surgery if offered; Claimant also told physical therapy personnel (to whom Claimant complained of "9" pain) that he "does not want" to have surgery. Even though Claimant testified that his cancer is in remission, Claimant has not expressed an interest in undergoing surgery", the error being that this finding is based purely on surmise, conjecture and speculation by the Commission as the Claimant has not been offered surgery since his cancer went in remission?
12. Did the Commission err as a matter of law in finding "I do find it inconsistent that Claimant would complain of "8," pain on "average" (meaning his pain goes even higher), but tell Dr. Gunter that he would 'not consider' surgery if offered; Claimant also told physical therapy personnel (to whom Claimant complained of "9" pain) that he 'does not want' to have surgery. Even though Claimant testified that his cancer is in remission, Claimant has not expressed an interest in undergoing surgery", the error being that this finding implies a duty on the part of the claimant to accept or even request surgery when the South Carolina Court of Appeals has directly held that an injured worker is justified in refusing surgery under similar circumstances?

13. Did the Commission err in finding, “the authorized treating physician assigned a 10% impairment rating and released the claimant to medium work. I give greater weight to the medium duty restrictions imposed by the authorized treating physician than I give to any other evidence regarding restrictions,” the error being that this finding is not supported by substantial the evidence in the record?
14. Did the Commission err in finding, “the authorized treating physician assigned a 10% impairment rating and released the claimant to medium work. We give greater weight to the medium duty restrictions imposed by the authorized treating physician than we give to any other evidence regarding restrictions,” the error being that throughout its Order, the Commission cites the authorized treating physician as a basis for certain findings but lends weight **only** to those portions of the authorized treating physician’s opinions which she construes as negative to the claimant’s case, when the treating doctor’s opinion as a whole should be found either credible or lacking in credibility?
15. Did the Commission err in finding, “there is no impairment rating in evidence as far as the leg is concerned – even from Claimant’s IME . . .”, the error being that South Carolina case law directly on point has ruled that an impairment rating is not necessary for a body part to be considered “affected” by the work-related injury?
16. Did the Commission err in finding, “Claimant’s IME ‘admits’ that, ‘I’m not finding any definite weakness or definite neurological deficit involving the right lower extremity nor the left lower extremity’, the error being that the Commission often piecemeal cites the Claimant’s IME as a basis for its findings but lends weight **only** to those portions of the claimant’s IME report which she construes as negative to the claimant’s case?
17. Did the Commission err in finding, “Claimant’s IME ‘admits’ that, ‘I’m not finding any definite weakness or definite neurological deficit involving the right lower extremity nor the left lower extremity’, the error being that the finding is not supported by substantial evidence in the record to the extent that the Commission lends “more weight” to the authorized treating physician’s opinion on rating and restrictions but seemingly discounts the authorized treating physicians’ diagnoses of left-sided and right-sided radiculopathy?
18. Did the Commission err in finding, “claimant’s complaints involving his legs are not always consistent, a finding I base on the pain diagrams in evidence,” (emphasis added) the error being that this finding is not supported by substantial the evidence in the record?

19. Did the Commission err in finding, "the claimant's straight leg test is negative", the error being that this finding is not supported by substantial the evidence in the record to the extent the claimant's radiculopathy has been documented and diagnosed by the authorized treating physicians, to whose opinions the Commission gave great weight but only when those opinions could be construed as negative to the claimant's case?
20. Did the Commission err in finding, "Notwithstanding Claimant's testimony to the contrary, I find that Claimant's use of a cane is attributable to his weakened condition from cancer, radiation and chemotherapy (medical evidence in its entirety; observations of the undersigned)", the error being that this finding is based **purely** upon surmise, conjecture and speculation by the Commission?
21. Did the Commission err in finding, "We find that Claimant's restrictions of "sedentary" to "limited light" are based primarily (if not essentially) upon Claimant's aerobic capacity", the error being this finding is speculative and not supported by substantial the evidence in the record?
22. Did the Commission err in finding, "We give greater weight to the medium duty restrictions as imposed by the authorized treating physician," the error being the authorized treating physician provided no sound medical basis for imposing medium duty restrictions on the Claimant as compared with the other opinions in the record?
23. Did the Commission err in finding, "We give greater weight to the medium duty restrictions as imposed by the authorized treating physician," the error being that the Commission gave great weight to the opinions of the authorized treating physicians but only when those opinions could be construed as negative to the Claimant's case?
24. Did the Commission err in finding, "We considered the opinion of Claimant's one-time IME. However, in this case, I give greater weight to the opinion of the authorized treating physician as to restrictions attributable to the work injury", the error being that the Commission inconsistently placed great weight on the opinions of Claimant's IME physician on multiple occasions in its Order, but only where those opinions could be construed as negative to the Claimant's case?
25. Did the Commission err in finding, "We considered the opinion of Claimant's one-time IME. However, in this case, we give greater weight to the opinion of the authorized treating physician as to restrictions attributable to the work injury", the error being that the Commission's Order inconsistently picks and chooses which portions of the Claimant's IME and which opinions of the authorized treating physician are entitled to more weight depending on which of those can be construed most negatively against the claimant, rather than exercising its duty as an objective fact finder and considering the overall credibility of each source?

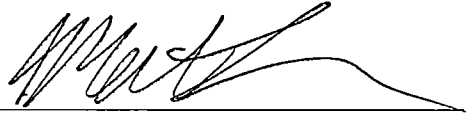
26. Did the Commission err as a matter of law in finding, "Dr. Forrest's opinion that "*the lung cancer is not playing any role*" in Claimant's inability to work [emphasis added] is not persuasive, the error being that Dr. Forrest's opinion is the only expert opinion in the record regarding this complicated medical issue?
27. Did the Commission err in finding, "Dr. Forrest's opinion that "*the lung cancer is not playing any role*" in Claimant's inability to work [emphasis added] is not persuasive, the error being that the finding is not supported by substantial the evidence in the record?
28. Did the Commission err in finding, "Dr. Forrest's opinion that "*the lung cancer is not playing any role*" in Claimant's inability to work [emphasis added] is not persuasive, the error being that the reasons cited by the Commission as "refuting" the opinion of Dr. Forrest, are either not probative or based on outright speculation by the Commission?
29. Did the Commission err in finding, "Claimant's IME's 21% impairment rating is not persuasive given the facts that Claimant was treated conservatively, and did not undergo surgery", the error being that the impairment rating of Dr. Forrest is the only impairment rating in the record for which a valid medical basis is provided?
30. Did the Commission err in finding, "Claimant's IME's 21% impairment rating is not persuasive given the facts that Claimant was treated conservatively, and did not undergo surgery", the error being that the finding is based purely upon surmise, conjecture and speculation by the Commission?
31. Did the Commission err in finding, "We considered Claimant's vocational report, but we give greater weight to the authorized treating physician's recommendation of **medium** duty work along with the 10% rating,"the error being that the finding is not supported by substantial the evidence in the record to the extent that the authorized treating physician's opinion of medium duty work did not consider the other vocational factors at play such as age, education, and the Claimant's qualification for medium duty work?
32. Did the Commission err in finding, "As a high school graduate and capable of performing medium duty work, as far as his back injury is concerned, he is not permanently and totally disabled from a workers' compensation standpoint. . .", the error being that the finding is not supported by substantial the evidence in the record?
33. Did the Commission err in finding, "As a high school graduate and capable of performing medium duty work, as far as his back injury is concerned, he is not permanently and totally disabled from a workers' compensation standpoint. . .", the error being that the Commission blithely ignored the claimant's age, poor academic testing and evidence in the record regarding his performance in high school and eligibility for special education classes in arriving at this finding?

34. Did the Commission err in finding, "Claimant's vocational expert 'parrots' Dr. Forrest's **inaccurate** statement that Claimant's cancer plays no role in his inability to return to work," (emphasis added) the error being that the finding is not supported by substantial the evidence in the record?
35. Did the Commission err as a matter of law in finding, "Claimant's vocational expert 'parrots' Dr. Forrest's **inaccurate** statement that Claimant's cancer plays no role in his inability to return to work,"(emphasis added) the error being that the vocational expert **correctly** relied on Dr. Forrest's statement as the **only** medical evidence presented with regard to parsing the claimant's cancer from the claimant's back injury as a potential causes for his disability to the extent that, like the Commission, the vocational expert is not a medical doctor and therefore is incapable of rendering her own medical opinions?
36. Did the Commission err in finding, "Claimant's vocational expert 'parrots' Dr. Forrest's **inaccurate** statement that Claimant's cancer plays no role in his inability to return to work,"(emphasis added) the error being that the Commission's characterization of Dr. Forrest's statement as "inaccurate" is unsupported by substantial evidence in the record?
37. Did the Commission err in finding, "Claimant's vocational expert 'parrots' Dr. Forrest's **inaccurate** statement that Claimant's cancer plays no role in his inability to return to work,"(emphasis added) the error being that the Commission's characterization of Dr. Forrest's statement as "inaccurate" is based **purely** upon surmise, conjecture and speculation by the Commission?
38. Did the Commission err as a matter of law in finding, "I find that Claimant's disability stems primarily from his cancer condition, including but not limited to the effects of the chemotherapy and radiation Claimant has undergone," the error being that this is a complex medical issue that can only be decided by expert medical testimony and the only reliable evidence in the record concerning the Claimant's cancer and the effects of chemotherapy and radiation is the **uncontradicted** medical opinion of Dr. Forrest that Mr. Dent is permanently and totally disabled by his back condition alone?
39. Did the Commission err as a matter of law in finding, "I find that Claimant's disability stems primarily from his cancer condition, including but not limited to the effects of the chemotherapy and radiation Claimant has undergone," the error being the finding is not supported by substantial the evidence in the record?
40. Did the Commission err as a matter of law in finding, "I find that Claimant's disability stems primarily from his cancer condition, including but not limited to the effects of the chemotherapy and radiation Claimant has undergone," the error being that the claimant was already taken out of work and receiving temporary total disability benefits when he was diagnosed with cancer and thus, this case falls under the purview of the Supreme Court's opinion in Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006)?

41. Did the Commission err as a matter of law in finding, "We find that Claimant's disability stems primarily from his cancer condition, including but not limited to the effects of the chemotherapy and radiation Claimant has undergone," the error being the finding is not supported by substantial evidence in the record and necessarily ignores Mr. Dent's uncontradicted testimony that his cancer is in remission and, therefore, is not a factor in his current inability to return to work?
42. Did the Commission err as a matter of law in finding, "We find that Claimant's disability stems primarily from his cancer condition, including but not limited to the effects of the chemotherapy and radiation Claimant has undergone," the error being the finding is based purely upon surmise, conjecture and speculation by the Commission?
43. Did the Commission err as a matter of law in finding, "PPD pursuant to Section 42-9-30(21): 35% . . .", the error being that the finding is not supported by substantial evidence in the record where the evidence of the case shows that he is entitled to an award of permanent and total disability under Section 42-9-10 of the Act?
44. Did the Commission err as a matter of law in finding, "PPD pursuant to Section 42-9-30(21): 35% . . .", the error being that the finding is not supported by substantial evidence where the totality of the evidence shows that the claimant has sustained a greater than 50% loss of use of his back to perform the job duties for which he is qualified?
45. Did the Commission err as a matter of law in finding, "PPD pursuant to Section 42-9-30(21): 35% I base this award on Claimant's restrictions as imposed by the authorized treating physician ("Medium") vis a vis the fact that Claimant was able to perform heavy or very heavy work prior to the date of accident. This award encompasses any subjective radiculopathy, although (a) Claimant's pain diagrams do not always feature leg pain, (b) there is no rating in evidence for the leg, and (c) Claimant's expert cannot find any weakness or neurological deficit with regard to either lower extremity", the error being this finding simply contains a regurgitation of erroneous factors cited by the Commission in prior findings and are not supported by substantial the evidence in the record and/or otherwise erroneous for reasons stated herein *supra*?
46. Did the Commission err in concluding as a matter of law that "Claimant is entitled to compensation pursuant to Section 42-9-30(21) of the South Carolina Code of Laws for the disability suffered to his back," the error being that the Claimant should have been awarded permanent and total disability under Section 42-9-10 of the Act?
47. Did the Commission err in concluding as a matter of law that "Claimant is entitled to compensation pursuant to Section 42-9-30(21) of the South Carolina Code of Laws for the disability suffered to his back," the error being that the claimant should have been found permanently and totally disabled under Section 42-9-30(21) to the extent that he has sustained a greater than 50% loss of use of his back to perform the job duties for which he is qualified?

48. Did the Commission err in failing to order that the Claimant be granted an award for permanent and total disability, the error being that this order is not based on adequate findings of facts and conclusions of law which are supported by substantial evidence in the record and further that the findings forming the basis for this order are grounded in large part upon surmise, conjecture and speculation by the Commission?

RESPECTFULLY SUBMITTED,



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August 10, 2015

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August 10, 2015

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AUG 10 2015
SC Court of Appeals

The Honorable Jenny Kitchings
Clerk, SC Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

**RE: James Dent v. East Richland County Public Service
District
Trial Court Case No: 1205879**

Dear Ms. Kitchings:

Enclosed for filing is a Notice of Appeal in the above case.
Also enclosed are the following:

1. Proof of Service of the Notice of Appeal on the Respondents.
2. A copy of the Order which is to be challenged on appeal.
3. A Filing fee of \$100.00.

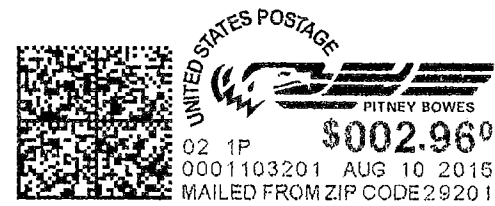
Sincerely yours,



Matthew Robertson

MR/kth/abh
Enclosures

cc: Page P. Snyder, Attorney
Amy Bracy, Judicial Director, SCWCC



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