THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM SOUTH CAROLINA
Workers Compensation Commission
Appellate Panel

Appellate Case No.: 2015-001702

James Dent, Employee, ... Appellant,

v.

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

FINAL BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW AUTHORITY

STATUTORY AUTHORITY

STATEMENT OF ISSUES ON APPEAL

I. Did the Workers' Compensation Commission err in issuing an Order failing to find that the Claimant's back injury has rendered him permanently and totally disabled under Section 42-9-10 or 42-9-30(21) of the South Carolina Workers' Compensation Act where the Commission's findings of fact are not supported by substantial evidence in the record?

II. Did the Workers' Compensation Commission err as a matter of law in failing to find that the Claimant's back injury has rendered him permanently and totally disabled under Section 42-9-10 or 42-9-30(21) of the South Carolina Workers' Compensation Act?

III. Did the Workers' Compensation Commission err in finding that the Claimant's disability is caused by his diagnosis of small cell lung cancer rather than his work-related back injury, where such a finding is not supported by substantial evidence in the record?

IV. Did the Workers' Compensation Commission err as a matter of law in finding that the Claimant's disability is caused by his diagnosis of small cell lung cancer rather than his work-related back injury?

STATEMENT OF THE CASE

This claim went before the Hearing Commissioner pursuant to Form 50 filed by the Claimant/Appellant, Mr. James L. Dent on September 20, 2013. Therein, Mr. Dent alleged injuries by accident to the back, right leg and left leg, occurring on May 1, 2012 and arising out of and in the course of his employment with East Richland County Public Service. Specifically, the Appellant alleged that he injured his back while attempting to singlehandedly move a heavy manhole cover. Appellant further alleged that he is permanently and totally disabled as a result of the accident both as a result of complete loss of earning capacity and as a result of a 50% or greater loss of use of his back to perform work. The Respondent/Defendants admitted the accident of May 1, 2012. However, the Defendants denied that the Appellant has sustained permanent and total disability and argued that the claim should be limited to the lumbar spine only.

The claim was heard by the Hearing Commissioner on February 7, 2014 in Columbia, South Carolina. On April 14, 2014, the Hearing Commissioner issued her Decision and Order, finding, *inter alia*, that the Appellant suffered an admitted injury to the back, that the Appellant's right leg is affected by the Appellant's back injury and that the Appellant's left leg is not affected; that Appellant's right leg is "only *minimally* affected"; that this is a "one body part" (i.e. *Singleton*) case; that Appellant's disability stems primarily from his cancer condition; that Appellant is entitled to an award of 35% permanent partial disability to the back.[1]

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[1] The Hearing Commissioner initially awarded the Appellant 40% permanent partial disability to the back but lowered her award to 35% without explanation after the first proposed Order was submitted by counsel for the Defendants. See R., pp. 203 - 210.

Pursuant to timely Form 30, the Appellant petitioned the Full Commission for review of the Hearing Commissioner's findings of fact and conclusions of law. The case was heard by the Full Commission and remanded to the Hearing Commissioner for consideration of two recent cases on point in further review of her finding that the case is a "one body part" case. In response, the Hearing Commissioner issued Remand Order, withdrawing her finding that this is a "one body part" case but still finding that the Appellant is not permanently and totally disabled as a result of his back injury.

The Appellant then appealed the Hearing Commissioner's remand Order back to the Full Commission. The case was heard by the Full Commission on May 18, 2015 and the Full Commission issued its Order on July 10, 2015 fully affirming the Hearing Commissioner's decision. From the Full Commission's Order, the claimant has taken this appeal.

STATEMENT OF THE FACTS

The Appellant testified that he has been diagnosed with small cell lung cancer and that his cancer is in remission. His last session of chemotherapy was in December 2013. (R., p. 160). The Appellant fifty-eight years of age and his date of birth is November 4, 1955. He is married with three children. Mr. Dent currently resides at 1002 Lower Branch Lane in Elgin, SC. (R., pp. 162-163). He has lived at that address for twenty-three years. Mr. Dent stated that he did graduate from high school but his grades were poor. He agreed that he probably graduated with a "D" average. (R., p. 163).

The Appellant further testified that he previously worked for a company called J. B. White's. His job with J. B. Whites was to deliver furniture. Mr. Dent stated that was definitely a heavy labor job which required a large amount of lifting. He also had to do a lot of loading and

unloading of trucks. (R., pp. 163-164). His next job was with Blyco Glass Company. In that position, Mr. Dent installed glass in frames. He was required to stack large, heavy windows. The windows he lifted in that job weighed over one hundred pounds. (R., pp. 165-166). He later worked for a company called Wometco Vending. In that job, Mr. Dent installed vending machines. He was required to move the vending machines on hand trucks and then maneuver them into the right position. His job with Wometco required a good deal of heavy lifting, pushing and pulling. (R., pp. 166-167).

Mr. Dent further testified that he went to work for the East Richland County Public Service District in 1985. The Appellant worked for the Employer for twenty-seven years until he was injured in 2012. (R., pp. 167-168). His job at the Public Service District was to maintain sewer lines. When he first started, that was a general labor job. In the course of his duties there, Mr. Dent was required to dig up sewer lines, lay pipe and unstop sewer lines. He had to dig up ditches, which entailed quite a bit of bending and stooping. He would be on his feet the entire time he was digging the ditches. He does not believe he could do that type of work any longer as a result of his back injury. (R., pp. 168-169). With regard to laying pipe, Mr. Dent would be required to carry the pipe from a truck to the ditch. The piping weighed between forty and fifty pounds. Mr. Dent testified that he does not believe he could carry the pipe with his current back condition. (R., pp. 169-171).

In order to unstop a sewer line, Mr. Dent would use little jet machines that go up in the line and do it. This was like a tube that Mr. Dent would put in the line to hopefully unstop it. This entailed quite a bit of pushing and pulling on his part. But if the machines did not work, he had to dig up the line with a shovel. Mr. Dent stated that he does not believe he could do that

part of his job any longer due to his back condition. (R., pp. 170-171). Mr. Dent also had to lift manhole covers in the street. After lifting and removing the manhole cover, he would have to climb down a ladder to get in and out of the sewer. Because of his back condition, the Appellant does not believe he could do the climbing any longer and he emphatically stated that he can no longer lift or move manhole covers. (R., pp. 172-173).

Mr. Dent further testified that he was eventually promoted to foreman of his own crew with the Public Service District. However, he was still required to perform heavy labor tasks after becoming a foreman. It was considered a working supervisor position and he would also have to fill in and perform the duties of crew members who called in sick or did not show up for work. (R., p. 173). As a result of his back injury, Mr. Dent believes he is unable to return to work performing the duties required of his position.

The Appellant further testified that on May 1, 2012, he was working around a ditch and he was trying to move a manhole cover back into place when his back went out. At that moment, he immediately felt a sharp pain and went to his knees. The Appellant's supervisor, Jack, was there on the job site when the accident occurred and Jack witnessed the incident. (R., pp. 174-175). The Appellant was hurting in his lower back, all the way across, at that time.

Mr. Dent was first sent to a doctor, Dr. Belmar, about a week after the accident occurred. Dr. Belmar prescribed medications for him and that was about it. (R., pp. 175-176). He was later sent to see a specialist, Dr. Brett Gunter. Mr. Dent remembers being sent for physical therapy, where he did exercises and got heat treatments. He does not believe the physical therapy provided him with lasting relief of his back symptoms. (R., pp. 176-177). Mr. Dent also received steroid injections from Dr. Gunter. He stated that the injections provided relief for

about two weeks and then the effect of the injections would wear off. The Appellant discussed the possibility of having surgery done on his back but Mr. Dent felt he was unable to undergo surgery at that time because of the status of his cancer and treatment for that condition. (R., p. 177).

The Appellant stated that he recalls being sent by Dr. Gunter for a work hardening evaluation, which entailed tests to see what he could lift, how long he could walk on a treadmill, etc. However, he could not complete the tests. The Appellant stated he had to stop because of back pain and shortness of breath. (R., pp. 178-179). Afterwards, the Appellant's understanding from Dr. Gunter was that the work hardening program would not do him any good. Mr. Dent is aware of the fact that Dr. Gunter opined he could only perform Medium level work. (R., p. 182). The Appellant further testified that he agrees with the assessment of Dr. Forrest that he has sustained more than fifty percent loss of use of his back for work purposes as a result of his injury with East Richland. (R., p. 183).

The Appellant further testified that he still has pain in his lower back. He stated that the pain goes down his right leg. He sometimes has pain in his left leg as well but the pain is mostly in his right leg. He feels that the pain in his lower back is around an eight out of ten. The Appellant also experiences numbness or weakness in his right leg. Mr. Dent stated that he has instability in his right leg as a result and it sometimes feels as if it is going to give way. In fact, he stated that he had fallen "the other night" due to the weakness in his right leg and injured his arm as a result. (R., pp. 183-184). Mr. Dent's understanding is that his back injury's effect on his sciatic nerve is the cause for the pain, weakness and instability in his right leg. (R., p. 185).

Mr. Dent stated that he often has trouble sleeping. The Appellant is still taking

medications for his lower back, including Percocet. He has difficulty standing for long periods of time and he also has trouble sitting for long periods of time. (*Id.*). The Appellant stated that he can only walk a short distance, such as between the witness chair and the door to the hearing room, before his back makes him stop to rest. He has difficulty making long trips in his car, but he does get out and walk around when he is able. (R., p. 186). He is unable to do his own yard work and he no longer goes fishing as he used to do. The Appellant stated that he no longer drives a vehicle because he is afraid of "falling out." He stated that he is not sure whether that was an effect of his cancer treatment or was related to his back. (R., pp. 187-188).

The Appellant further testified that he has done heavy labor his entire life and that he has never done a job in his life that did not require heavy labor. Mr. Dent does not believe he could return to any of the type of work he has done in the past. He stated that he would not be able to lift or move large vending machines, lift one hundred pound materials and windows or lift and deliver furniture. He would not be able to go back to doing most of the tasks for which he was responsible in his twenty-seven year employment with the East Richland Public Service District. The Appellant testified that he cannot dig or climb in and out of ditches. (R., pp. 189-190).

Mr. Dent further stated that he would not be able to do a job which requires him to use a computer, complete paperwork or do arithmetic. He is not qualified to do a desk job and he feels there are no jobs within his physical restrictions that he is capable of performing. (R., pp. 191-192). He feels this disability from work stems from his back injury. Finally, the Appellant agrees that he complained of right leg pain in his very first visit with Dr. Belmar if her record from that visit so indicates. (R., pp. 192-198).

STANDARD OF REVIEW

The Administrative Procedures Act establishes the "substantial evidence" rule as the standard for judicial review of agency decisions. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). The Administrative Procedures Act provides for judicial review upon exhaustion of all administrative remedies, but states that the Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. S.C. CODE ANN. §1-23-380(G) (1976, as amended).

For purposes of this review, the Court may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the administrative findings and decisions are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record" or they are "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. CODE ANN. §1-23-380(G)(5)-(6) (1976, as amended). Thus, under the substantial evidence standard, a decision of the South Carolina Workers' Compensation Commission must be affirmed if the factual findings are supported by substantial evidence in the record. *Jennings v. Chambers Development Co.*, 335 S.C. 249, 516 S.E.2d 453 (S.C. App. 1999).

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion reached by the administrative agency in order to justify its action. *Miller v. State Roofing Co.*, 312 S.C. 452, 441 S.E.2d 323 (1994). Where there is a conflict in the evidence, either by different witnesses or in the testimony of the same witness, the

findings of fact of the Commission are conclusive. *Tiller v. National Health Care CR.*, 334 S.C. 333, 513 S.E.2d 843 (1999).

This Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but **may** reverse if the decision is affected by an error of law. *Youmans v. Coastal Petroleum Co.*, 333 S.C. 195, 508 S.E.2d 43 (S.C. App. 1998). However, the Court of Appeals applies a *de novo* standard of review to questions of law. Again, the Court **may** reverse or modify a decision if the findings and conclusions of the agency are affected by error of law, clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. CODE ANN. §1-23-380(6) (Supp. 2003).

ARGUMENTS

I. DID THE WORKERS' COMPENSATION COMMISSION ERR IN FAILING TO FIND THAT THE APPELLANT IS PERMANENTLY AND TOTALLY DISABLED PURSUANT TO SECTION 42-9-10 OR 42-9-30(21) OF THE ACT?

The Commission erred both in its fact finding and as a matter of law in failing to find that the Appellant is permanently and totally disabled. Under the Act, when an employee's incapacity from work resulting from a work-related injury is total, the employer is required to pay weekly compensation equal to sixty-six and two-thirds percent of the employee's average weekly wages for a period not to exceed five hundred weeks. S.C. CODE ANN. §42-9-10 (1976, as amended). The generally accepted test of total disability is the inability to perform services other than those that are "so limited in quality, dependability, or quantity that a reasonable, stable market for them does not exist." *Wynn v. Peoples Natural Gas Co.*, 238 S.C. 1, 118 S.E.2d 812 (1961).

An award under the general disability statutes must be predicated upon a showing of loss

of earning capacity. *Fields v. Owens Corning Fiberglas*, 301 S.C. 554, 393 S.E.2d 172 (1990); *see also Hendricks v. Pickens County*, 335 S.C. 405, 517 S.E.2d 698 (S.C. App. 1999). In a workers' compensation case, the employee alleging a general disability has the burden of proving that he or she has lost earning capacity. Consequently, an employee will not be deemed to be totally disabled unless he is capable of performing other work that is continuously available to him. *Coleman v. Quality Concrete Products, Inc.*, 245 S.C. 625, 142 S.E.2d 43 (1965).

Here, the overwhelming preponderance of the evidence in the record shows that the Appellant is unemployable and his earning capacity has been completely destroyed by the work-related injury suffered to his lower back. Nevertheless, the Commission amazingly failed to find that he is permanently and totally disabled under Section 42-9-10 of the Act. The Appellant would submit that substantial evidence does not exist in the record to support the Commission's decision.

In the case at bar, the greater weight of the evidence shows that there is no reliable market of employment available to the Appellant. The authorized treating physician, Dr. Gunter, opined that he would recommend medium duty at best, but further indicated that the Appellant does not believe he could perform any work more than sedentary. (R., p. 123). The Commission chose to give great weight to the medium duty restrictions imposed by the authorized treating physician. (R., 50). However, as discussed *infra*, there is **no** evidence in the record to support the Commission's fantasy that Mr. Dent could ever be qualified for medium duty.

Mr. Dent is fifty-eight years of age and his entire work history has been in occupations classified as heavy and/or very heavy labor. The Commission itself states in Finding of Fact ¶4, "Claimant's prior employment involves work (a) delivering furniture; (b) installing glass, and (c)

installing vending machines. ***These jobs are all considered heavy or very heavy.***" (Emphasis added). (R., pp. 48-49). For the last twenty-seven years of his career, the Appellant worked for the Defendant, East Richland Public Service District, in a very heavy labor position. This man has never performed a Medium duty position in his life; his **entire** work history consists of heavy labor. Every expert in the record is in agreement that the Appellant cannot return to his previous position or any heavy labor job.

Moreover, in his IME report, Dr. Leonard Forrest opined, "Clearly he can't return to work at his prior job. However, I don't think he'd be able to work even at a lesser level on any regular basis; again, this is purely with regard to the work-related injury." (R., p. 97). Dr. Forrest further stated, "Also, to be considered is the fact that Mr. Dent has worked doing such manual labor work for his whole career. Even though he has a high school education, I don't see him being able to learn new skills to work at a different job that would be a sedentary one, for example. Even at that, I'm not convinced he would be able to even do sedentary-level work on a full-time basis." *Id.* In addition, Dr. Forrest opined, "As for impairment rating, in my opinion this is a class 3 motion segment lesion and I would ascribe a 21% permanent impairment rating for the result of the work incident that occurred on May 1, 2012." *Id.*

In letter dated July 1, 2013, physical therapist Deborah Antley, who had attempted to assess Mr. Dent for the possibility of entering a work-hardening program stated, that the findings during the Work Conditioning Evaluation showed Mr. Dent was able to lift 10 to 20 lbs only on an occasional basis and this would support the conclusion that he is only able to perform sedentary to limited light work. (R., p. 85). In response to this opinion, the Commission speculates that Mr. Dent's evaluation results were the results of "conditioning" rather than his

injury.

In fact, the Commission offers no substantive evidence to support its implicit finding that the Appellant is able to perform medium level work other than the fact that he is a high school graduate. (R., p. 48). However, the vocational evidence in the record, which shows that the Appellant has very limited academic function, graduated high school with a "D average" and was eligible for special education classes, proves Dr. Forrest's suspicion that the Appellant's high school diploma is more or less worthless in assisting him to perform anything other than heavy labor. (R, pp. 98-99, 117-118,120)

In its Order, the Commission indicates that it considered the vocational report submitted by the Appellant but gave "more weight" to the opinion of Dr. Gunter that the Appellant can perform Medium duty work. (R., p. 51). However, the flaw in the Commission's reasoning is that Dr. Gunter gave a purely medical opinion without considering the other vocational factors affecting the Appellant's ability to perform Medium duty work.

Thus, the Commission chose to completely disregard the **unrefuted**[2] conclusion of vocational expert Harriet Fowler that the Appellant is not qualified even for Medium level work. In essence, by its own admission, the Commission relied solely on the limited medical opinion of Dr. Gunter rather than considering the other vocational evidence in the record when, in fact, Dr. Gunter's opinion should have been viewed as just one piece of the evidence to be considered in the entire picture of the claimant's vocational potential. The obvious question then becomes, what did the **unrefuted** vocational evidence reveal?

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[2] The Respondents chose not to submit evidence in the form of an expert vocational opinion to challenge the conclusions of Ms. Fowler.

On September 13, 2013, the Appellant was administered the Wide Range Achievement Test-Revision 3 by vocational expert Harriet Fowler. "He scored at 3rd at arithmetic, 4th grade level in spelling, and at 5th grade level in reading." (R., p. 117). Although the Commission attempts to minimize the impact of this evidence by suggesting that the Appellant has suffered memory loss as a result of cancer treatments and noting that his wife had to assist him in answering certain questions, Ms. Fowler researched his high school records at the request of counsel and found his achievement testing in high school to be at a similarly low level of functioning to the extent that Ms. Fowler is of the opinion that his achievement scores were not lowered by his cancer treatment. (R., p. 120). This evidence is unrefuted.

Ms. Fowler further opined that the Appellant "is and will be unable to obtain or maintain substantial gainful employment" due to factors such as advancing age, educational and functional academic levels including illiteracy , work history, and severe physical limitations. (R., p. 118). Further, the Appellant's testimony indicates that, although he was graduated from high school with a diploma, he maintained mostly a D average and he was eligible for special education classes.

The Commission completely disregarded this evidence even though Ms. Fowler's expert testimony is **uncontradicted** as the Defendants chose not to submit any report or conclusions from a vocational expert of their own. This is very troubling as the results of Ms. Fowler's analysis indicate that the Appellant is unemployable as he is neither qualified nor capable of performing medium, light or sedentary duty.

Finally, the Appellant's lay testimony indicates that he is incapable of returning to any type of employment that he has ever done in the past and further that there is no job he is capable

of performing physically for which he would be qualified. Again, the Appellant testified that he has done heavy labor his entire life and that he has never done a job in his life that did not require heavy labor. His testimony touched on the job duties he has performed in each of his jobs and plainly indicated that he would not be able to perform those physical tasks since his back injury. He would not be able to go back to doing most of the tasks for which he was responsible in his twenty-seven year employment with the East Richland Public Service District. Mr. Dent further stated that he would not be able to do a job which requires him to use a computer, complete paperwork or do arithmetic. (R. pp. 189-192). Defendants produced no evidence to refute the Appellant's lay testimony.

To justify its decision to minimize the Appellant's level of disability, the Commission apparently relied on three dubious factors: (1) impairment ratings; (2) the Appellant's refusal of surgery; and (3) the Appellant's diagnosis in 2012 of small cell lung cancer. As far as impairment ratings are concerned, Dr. Gunter opined a 10% permanent partial impairment of the Appellant's whole person according to the AMA Guidelines. (R., p. 51).

However, Dr. Gunter offered no explanation of how he arrived at that figure under the Guidelines. Nevertheless, without explanation of the rationale for its decision, the Commission found Dr. Gunter's rating to be more credible than that of Dr. Forrest despite the fact that Dr. Forrest clearly indicated his 21% rating was based on his diagnosis of a class 3 motion segment lesion. Moreover, the Commission's reliance on the impairment rating of Dr. Gunter did not seem to deter the Commission in finding of a 35% partial permanent disability to the claimant's back.

With respect to the Appellant's refusal of surgery, the Commission seems to suggest that

the Appellant's level of disability must be smaller than he claims because he was treated "conservatively." The Commission then proceeds to cast doubt on the Appellant's credibility in its Finding of Fact ¶12 by **speculating** that a person with pain complaints of 8 or 9 on a scale of 1-10 would not refuse surgery. However, fear of surgery is neither probative of the Appellant's disability nor of his credibility. In fact, this should not even be considered a relevant factor in the case.

In *Scruggs v. Tuscacora Yarns, Inc.*, 294 S.C. 47, 362 S.E.2d 319 (S.C. App. 1987), the Court of Appeals found that Scruggs was justified in refusing surgery where she 61 years old at the time of the hearing and had a heart problem. Mrs. Scruggs testified she had seriously considered surgery, but in light of her age and other factors, felt it would not benefit her. The Court of Appeals found that she was justified in refusal of surgery under the circumstances, that she was at maximum medical improvement and that she was permanently and totally disabled.

Here, the Appellant had equally compelling reasons for his fear of surgery at the time it was discussed with Dr. Gunter. Obviously, the Appellant's fear of back surgery was related to his cancer and treatment thereof at that time. In addition, there is nothing in the record to suggest that Dr. Gunter ever opined that the Appellant would actually benefit from surgery. Dr. Gunter merely states, "[H]e would not consider a surgical alternative should one be offered." (R., p.124).

Incredibly, the Commission next found, "[E]ven though Appellant testified that his cancer is in remission, Appellant has not expressed an interest in undergoing surgery." However, there is absolutely no evidence in the record to suggest that the Appellant has been offered back surgery since his cancer went into remission. Hence, and particularly in light of the higher

courts' ruling in *Scruggs*, the Appellant would submit that his fear and/or refusal of surgery is in no way probative to the issue of his permanent disability.

Thus, we have an injured worker who is 58 years of age and has suffered, under the Commission's estimation, at least a 35% disability to his spine. He has a 27 year work history with the Employer in this case, performing heavy labor. The evidence in the record shows that he has always performed heavy labor. The IME doctor who examined the Appellant believes he is capable of sedentary duty only. The vocational evidence shows that his academic abilities are, and always have been, severely limited and that he is not qualified for any employment other than heavy duty labor, which every expert agrees he is incapable of performing as a result of his back injury. Finally, the claimant's lay testimony proves that he is unable to return to work in any job he has ever performed.

In light of the foregoing arguments, the Appellant would submit that the Commission's Order is not supported by substantial evidence in the record and respectfully requests that this Court reverse the Commission's decision and instead find that the Claimant is permanently and totally disabled under Section 42-9-10 and/or 42-9-30(21) of the Act.

II. DID THE WORKERS' COMPENSATION COMMISSION ERR AS A MATTER OF LAW IN FINDING THAT THE CLAIMANT'S DISABILITY IS MORE A RESULT OF SMALL CELL LUNG CANCER THAN HIS WORK-RELATED BACK INJURY?

The Workers' Compensation Commission erred egregiously in finding that the Appellant's total disability is a result of his small cell lung cancer rather than his work-related back injury. In a particularly disturbing decision, the Commission found in Finding of Fact ¶26, "Although the undersigned greatly sympathizes with Appellant, we find that Appellant's

disability stems primarily from his cancer condition, including but not limited to the effects of the chemotherapy and radiation Appellant has undergone." (R., p. 51). This finding is not supported by substantial evidence in the record and amounts to nothing more than pure speculation by the Commission. Moreover, this conclusion is a clear result of legal error.

After going out of work due to his on-the-job back injury, Mr. Dent was diagnosed with small cell lung cancer. (R., p. 160). As justification for the conclusion that Mr. Dent's disability stems from his cancer condition, the primary evidence cited by the Commission is the fact that he reported to a physical therapist that he had decided to retire and the "first reason" he gave for that decision was his lung cancer. (R., p. 84).

Needless to say, there is no evidence that the physical therapist accurately recorded the correct order in which the Appellant's reasons for retirement were listed. Nevertheless, the Appellant admittedly did mention that he was retiring due to lung cancer and his back condition. However, the idea that the condition which he **may** have mentioned first in that conversation was lung cancer and, therefore, lung cancer should be considered the "primary" cause for his disability is preposterous. If the Appellant had happened to mention his low back condition first in that lone statement, would the Commission's analysis have been different?

Moreover, this particular finding is contradicted by the fact that the work hardening therapist, when explaining reasons why testing would be limited, listed the Appellant's low back condition before his lung cancer. (R., p. 85). This was the physical therapist's own statement and not something allegedly said by the Appellant at a therapy visit. Therefore, if the **order** in which his conditions are listed is even remotely probative, why is the expert's statement somehow less persuasive than an offhand remark made by the Appellant to his therapist at one of

his appointments? The obvious answer is that neither statement is particularly probative as to the "primary" cause for the Appellant's disability and even if they were, the physical therapist's statement should clearly carry more weight.

Further, in Finding of Fact ¶26, the Commission stated, "[I]n determining permanency, the undersigned must parse the (a) back condition from (b) cancer and its residuals." The Appellant would submit that such a parsing between the Appellant's back injury and small cell lung cancer constitutes a medically complex problem and, therefore, would require expert testimony to form the basis of the Commission's finding on this issue. *See* McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 318 S.E.2d 38 (S.C.App. 1984). However, the only expert testimony in the record to the medical cause of Mr. Dent's disability is that of Dr. Forrest, a board certified spinal surgeon.

In fact, the Defendants deposed the Appellant months before the hearing took place and discovered that he had been under the care of an oncologist. They had ample opportunity to subpoena the records of the Appellant's oncologist, Dr. Wise, and/or to depose that specialist, in order to enter evidence that lung cancer is purportedly the "primary" cause for the Appellant's current level of disability. However, that was not done and the Defendants produced no expert evidence which would support the Commission's finding.

Again, the **only** expert evidence regarding whether the Appellant is disabled due to his back or due to his lung cancer was offered by Dr. Forrest who opined, "In fact, the lung cancer is not playing any role in my opinion currently, which is that Mr. Dent is unable to return to work at any level." (R., p. 96). This expert opinion is **uncontradicted** by any other expert testimony or opinion in the record. However, addressing the opinion of Dr. Forrest, the Commission stated,

"during the very same time frame Appellant saw his IME, Appellant reported that his cancer had metastasized to the lymph nodes and an adrenal gland." As a result, the Commission, despite its inability to rely on any expert evidence offered by the Defendants to refute Dr. Forrest's opinion, instead relies on speculation to find that his opinion "not persuasive." (R., pp. 50-51).

Along the same vein, the Commission comments in Finding of Fact ¶25, "Appellant's vocational expert 'parrot' [*sic*] Dr. Forrest's **inaccurate statement** that Appellant's cancer plays no role in Appellant's inability to return to work. Appellant relies upon the use of a cane that no workers' compensation physician prescribed." (Emphasis added) (*Id.*) First, the Appellant would submit that the Appellant's vocational expert is **not a medical doctor** and, therefore, is **not qualified** to offer expert medical opinions of her own. Thus, "parroting" the medical opinions of the actual medical experts in the case, and thereby relying on the medical evidence available to her, is exactly what a vocational expert is expected to do.

Further, regarding the Appellant's use of a cane, the Appellant would submit that the fact that he uses a cane that "no workers' compensation physician has prescribed"[3] is completely irrelevant. However, the Commission makes an incredible leap in logic to include a purely speculative finding that the cane is related to Mr. Dent's cancer diagnosis and/or treatment. To wit, the Commission states in Finding of Fact ¶20, "Notwithstanding Appellant's testimony to the contrary, we find that Appellant's use of a cane is attributable to his weakened condition from cancer, radiation and chemotherapy." As its basis for this finding, the Commission cites "the medical evidence in its entirety", of which there is none to support the conclusion, and the Hearing Commissioner's own "observations" which gives rise to the dubious proposition that a

[3] See Commission Order, July 10, 2015.

Commissioner with no medical training can look at a person and determine exactly why that person uses a cane even when he never used the cane while in her presence.[4]

In addition to the aforementioned statement, Dr. Forrest further noted in his report, "I want to emphasize that in my opinion Mr. Dent's inability to work is on the basis of his work injury and in my opinion that would be true whether or not he had the small cell lung cancer." (R., p. 95). Significantly, the Commission failed to even acknowledge this evidence. However, again, the only expert testimony in the record indicates that the Appellant would be permanently and totally disabled solely from his back condition, regardless of his cancer.

Moreover, perhaps the most significant evidence of all relating to this issue is Mr. Dent's own lay testimony that his lung cancer is currently in remission. As a result, regardless of what may have been the case "during the very same timeframe" as referenced by the Commission, the only **direct** evidence offered regarding Mr. Dent's condition as of the date of the hearing were Dr. Forrest's expert opinions and the Appellant's **uncontradicted** lay testimony that his cancer is in remission and that his back condition is solely responsible for his inability to work. Thus, while the Commission perceived a duty to "parse the (a) back condition from (b) cancer and its residuals," its Order represents an abject failure to correctly and fairly do so.

Further, the Commission states in Finding of Fact ¶28 that its award of 35% permanent partial disability to the back is based in part on "(a) Appellant's pain diagrams do not always feature leg pain, (b) there is no rating in evidence for the leg, and (c) Appellant's expert cannot find any weakness or neurological deficit with regard to either lower extremity." This constitutes yet another erroneous finding. First, the Act does not require an impairment rating in evidence to

[4] Mr. Dent did not present with a cane at the hearing of his case.

show that a body part has been affected by the injured worker's accident. *See, e.g.,* Beckman v. Sysco Columbia, LLC, 408 S.C. 501, 759 S.E.2d 750 (S.C.App. 2014).

Next, the Appellant would submit that it is highly ironic that the Commission relies on straight leg tests and extraneous statements from Dr. Forrest's report to discount weakness and/or neurological deficits in the Appellant's leg(s). Meanwhile, the Commission finds Dr. Forrest's expert opinion regarding the Appellant's level of disability from his back injury *vis a vis* his lung cancer diagnosis to be "not persuasive." Nevertheless, the diagnosis of the authorized treating physician, whose opinions as to impairment rating and Medium work duty were accorded "great weight" by the Commission, is sufficient to establish the fact that the Appellant suffers from causally-related weakness and radiculopathy in his leg(s) regardless of the results of his straight leg test at an IME. *Id.*

In addition, the Commission's reliance on pain diagrams in evidence to minimize the Appellant's radicular symptoms is misplaced. The Commission apparently failed to notice that two of the pain diagrams depicted pain in the lower back **and** radicular symptoms of numbness, tingling or weakness going down the Appellant's leg (R., pp. 75, 84), **exactly** as described by the Appellant in his testimony and his statements made to providers. In addition, **each** of the remaining pain diagrams in the record are accompanied by a section on their respective reports designated as "radicular symptoms" in which pain, tingling and weakness are noted in one or both legs. (R., pp. 75, 84). Progressive Physical Therapy, the provider responsible for the pain diagrams, offers a definitive diagnosis of "Lumbar Radiculopathy." (R., pp. 79, 81).

Finally, the Commission's logic in downplaying the severity of the Appellant's back injury *vis a vis* his lung cancer is belied by the fact that the Commission awarded a 35%

disability to the claimant's back. Regardless, of whether his cancer has a role in his disability, it is simply impossible to imagine that Mr. Dent, with a 35% disability to his back, substantial academic handicaps, and a work history consisting entirely of heavy duty labor could return to work in any capacity at age 58.

In the case at bar, the Appellant easily met his burden of proving that he is permanently and totally disabled as a result of his lower back injury. Unfortunately, the Commission erroneously made an award of scheduled compensation based apparently in large part on its purely speculative finding that small cell lung cancer is the "primary" cause for Mr. Dent's disability. However, an award or decision of the Commission must not be based on surmise, conjecture or speculation. *See, e.g.,* Fowler v. Abbott Motor Co., 236 S.C. 226, 113 S.E.2d 737 (1960). Hence, to the extent that the Commission's decision is unsupported by even substantial evidence, much less a preponderance of the evidence in the record, the Appellant respectfully requests that the Appellate Panel apply its collective wisdom to reverse the Commission's Order and instead make an award of permanent and total disability in this case.

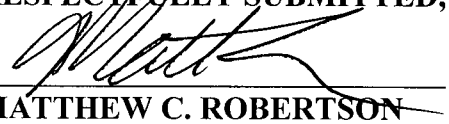
CONCLUSION

The Commission erred as a matter of law in failing to find that the Appellant is permanently and totally disabled. The Appellant is fifty-eight years of age and his entire work history has been in occupations classified as heavy and/or very heavy labor, including a twenty-seven year career with the East Richland Public Service District, in a very heavy labor position. Every expert in the record is in agreement that the Appellant cannot return to his previous position or any heavy labor job. Moreover, as demonstrated *supra*, the Commission's findings and rationale in support of its decision to place the blame for Mr. Dent's proven total destruction

of work capacity on small cell lung cancer and thereby deny the Appellant an award of permanent and total disability is plainly erroneous, purely speculative and unsupported by substantial evidence in the record.

Therefore, in light of the foregoing arguments, the Appellant respectfully requests that this Court reverse the findings and conclusions of the Commission and instead find that the Appellant is entitled to an award of permanent and total disability either under Section 42-9-10 of the Act or 42-9-30(21) to the extent that he has sustained 50% or greater loss of use of the back.

RESPECTFULLY SUBMITTED,



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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission
Appellate Panel

Appellate Case No.: 2015-001702

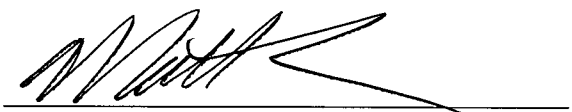
James Dent, Employee, ... Appellant,

v.

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

CERTIFICATE OF COUNSEL

Counsel hereby certifies that this Brief complies with the requirements of Rule 211 of the South Carolina Appellate Court Rules.



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