

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1102937
Appellate Case No. 2016-000514

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SC Court of Appeals

Barry Adickes, Claimant, Respondent,

v.

Philips Healthcare, Employer,
and Fidelity and Guarantee
Insurance Company, Carrier, Appellants.

INITIAL BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF ISSUES ON APPEAL

- I. Whether the Workers' Compensation Commission's findings of fact must be upheld when they are supported by the claimant's medical doctors and vocational expert.
- II. Whether the commission properly construed the partial disability statute to allow the claimant 340 weeks of benefits.

STATEMENT OF THE CASE

In September of 2014, Barry Adickes requested a hearing with the Workers' Compensation Commission, claiming reduced earning capacity after an injury. (Form 50).

Phillips Healthcare (the employer) and Fidelity & Guaranty Company (the insurance carrier) disputed this and also said a hearing was premature. (Form 51).

A single commissioner heard the claim in January of 2015. (Hr'g Comm'r Tr.). He issued an award in August of 2015, finding the claim was timely. (Hr'g Comm'r Or.).

Phillips and Fidelity appealed to the commission's appellate panel, (Form 30), which heard oral arguments in December of 2015. (Panel Tr.). The panel affirmed the single commissioner's decision the following February. (Panel Or.). This appeal follows.

SUMMARY OF ARGUMENT

Barry Adickes was a traveling salesman who was hurt in a single car accident while driving on a mountain road. He received several injuries, including a concussion.

The commission awarded this case because it believed Barry and his witnesses. It found Barry's brain injury caused persistent headaches as well as impaired focus and concentration. It also found these things kept Barry from working a demanding (and high-paying) job as a salesman. The record supports these findings. The Court should affirm.

STATEMENT OF FACTS

Barry's summary of this case's history is below. Several of the medical records contain similar accounts of his car wreck, and the hearing commissioner's decision has an 8-page synopsis of the case, including citations. (Hr'g Comm'r Or., pp.3-10).

On March 22, 2011, Barry accidentally drove his company car off a mountain road in North Carolina and crashed into a ravine. He lost consciousness for a period of time and spent 5 hours trapped in his car about 100 feet down the side of the mountain. He was rescued after he used his mobile phone to call EMS early the next morning. (Hr'g Comm'r Tr., p.15, line 16 - p.18, line 12) (Barry's description of the wreck).

Barry refused transportation to the hospital after being rescued. He said he knew the closest hospital to the crash site was two hours away from his home and he did not want to be admitted to a hospital so far away. (Id.p.18, line 13 - p.19, line 2). He went to a hotel, where his wife picked him up and drove him home to Rock Hill. (Claimant's APA, p.156). According to a medical record from two days after the wreck, Barry had severe headaches and vomited three times on the way home. *Id.*

Barry saw several physicians in the months that followed. Dr. James, Rentz, a neighbor, examined Barry for broken bones. *Id.* He eventually performed shoulder surgery, in October. (Id.pp.178-179). Dr. Nicholas Tuttle is Barry's family doctor, and he sent Barry to Dr. Howard Mandell, a neurologist, about 2 weeks after the wreck. (Id.pp.129-132). Extensive records document Barry's concussion, his neck injury, and damage to his right shoulder. (Id.pp.48-185). Doctors eventually gave Barry a 15% impairment rating to the right shoulder, a 10% rating to his spine, and a 15% rating to his brain. (Id.pp.77a, 82, 96).

Barry's case is unusual because he returned to work shortly after his injury and continued working for over 2 ½ years before he initiated these proceedings. Barry was out of work less than a month—the wreck was March 22, 2011, and he returned to work May 1. (Hr. Comm'r Tr., p.29, lines 19-21). Phillips terminated Barry 32 months later, in January of 2014. (Id.p.32, lines 13-21).

The parties dispute the details of the termination. Phillips says it was part of a companywide reduction-in-force and had nothing to do with Barry's work. (Id.p.128, lines 12-24). Barry says he recalls the conversation well and that his boss specifically told him the firing was performance-related. (Id.p.33, line 5 - p.34, line 19).

Regardless, Barry's job with Phillips ended and he sought other employment. He ultimately accepted a job in May of 2014, but he made substantially less money than he did with Phillips. (Resp't Ex.G, pp.42-43). Barry explained he wrote this lower salary on his application because he needed a job and a friend at the company in question told Barry exactly what the position paid. (Hr'g Comm's Tr., p.36, line 2 - p.37, line 11). At the hearing with the single commissioner, Phillips claimed it was Barry's fault he made less money; after all, he had requested the lower salary in his application. (Id.p.7, lines 10-15).

Barry claimed two things at the commission. First, he said the wreck left him with cognitive deficits; persistent headaches as well as impaired "executive function" impacting his focus, concentration, ability to multi-task, and similar skills. (Claimant's Form 58, with attachment). Second, he claimed these deficits prevented him from working a demanding and high-paying job like the one he had with Phillips. *Id.* He supported this claim with testimony from his wife, his doctors, and a vocational expert. *Id.*

The Appellants disagreed and offered multiple grounds for their disagreement.

They said the claim was not ripe; that Barry had not reached maximum medical improvement because Barry did not have disability ratings for his shoulders. (Hr. Comm'r Tr., p.7, lines 15-21). Barry would actually have these ratings by the hearing. (APA 77a).

The Appellants also argued Barry had not suffered a wage loss, and on this point, they disputed *everything*. They disputed whether Barry's headaches caused him to miss work and whether Barry had any cognitive deficits at all. (Resp't Form 58 Add., pp.1-12). They disputed whether Barry was believable. *Id.* They disputed whether Barry had been a good worker, whether Barry lied about jobs he said he pursued, and why Barry took a lower salary at the job he found. *Id.* They said Barry—a 21-year employee—had “disciplinary” issues and was a poor performer who had been “demoted” before his wreck, but they also insisted Barry was not fired for poor performance. *Id.* Of course, the reason Phillips fired Barry would not matter if the wreck caused brain damage, but no point went unchallenged.

The hearing commissioner issued an 18-page decision, summarizing the claims as well as the evidence. (Hr'g Comm'r Or.). He described the witness testimony, lay and expert. (*Id.* pp.5-10). He wrote that he had examined the entire file—specifically referencing his review of several depositions and records. (*Id.* p.11, ¶8; p.12, ¶19; p.13, ¶20; p.14, ¶32). The commissioner found Barry to be at MMI, (*Id.* p.11, ¶¶ 6-7), and that Barry suffered a cognitive deficiency limited to his executive function. (*Id.* p.16, ¶¶44-45). The commissioner also found executive function determined Barry's ability to hold a job like his sales job with Phillips. (*Id.* p.16, ¶45). The appellate panel issued identical findings. (Panel Or., pp.10-15). The panel's decision to affirm the single commissioner was unanimous. (Panel Or., p.16).

ARGUMENT

For the most part, this is a “substantial evidence” case. The Appellants disagree with the commission’s factual findings, but as the Court is aware, the Court is bound by the commission’s findings unless they are clearly erroneous, made on an unlawful procedure, controlled by a legal error, or arbitrary. S.C. Code Ann. § 1-23-380 (5) (Supp. 2015).

The Appellants say the case was not ripe for a hearing, but ample evidence supports the commission’s decision. A doctor gave Barry a permanent shoulder rating and said it was reasonable for Barry to try and avoid shoulder surgery as long as possible. The commission relied on this assessment. That reliance was within the commission’s discretion.

The Appellants also say Barry did not suffer a wage loss, but the Court need only review four (4) items—Dr. Waid’s report, Dr. Mandel’s deposition, Joel Leonard’s report, and Joel Leonard’s deposition—to see that ample evidence supports the commission’s decision. Other evidence is favorable too: There are helpful points in Barry’s performance evaluations and in the witness testimony, but the easiest way out of this case is to examine the evidence from the experts. Barry’s concussion left him with impaired executive function, and executive function was unfortunately a key part of his job. The commission did not have to believe these witnesses, but it chose to do so. That decision was reasonable.

Finally, the commission correctly read the partial disability statute (section 42-9-20) to allow Barry 340 weeks of benefits. Barry’s claim did not ripen until Phillips terminated him. The Appellants say they are seeking equity, but they are not. They are seeking to delay MMI, to take advantage of Barry’s return to work, and to pay Barry a fractional award instead of the claim’s full value. The award was proper. The Court should affirm.

I. The Workers' Compensation Commission's findings of fact must be upheld because they are supported by the claimant's medical doctors and the vocational expert.

The Appellants challenge the commission's findings that Barry has reached the point of maximum medical improvement and that he suffered a wage loss, but in neither case can the Appellants meet the burden imposed by section 1-23-380 and demonstrate that the commission's findings are clearly erroneous, made on an unlawful procedure, controlled by a legal error, or arbitrary.

- a. Dr. Barron's permanent impairment rating to Barry's right shoulder is evidence that a permanency award is appropriate.

"Maximum Medical Improvement" describes the point at which someone's medical condition ceases to improve. It is commonly called a "plateau" in someone's care because when someone reaches MMI, there is no further treatment that will help cure that person's underlying injury. This Court discussed MMI and these concepts in *O'Banner v. Westinghouse Elec. Corp.*, 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995).

Importantly, a workers' compensation claimant can be entitled to additional medical care *after* reaching MMI. This is because the law allows someone to continue receiving medical care that will lessen the injured person's "period of disability." This was the holding in *Dodge v. Bruccoli, Clark, Layman, Inc.*, where this Court reversed the commission for holding that medical care ends at MMI. 334 S.C. 574, 580-82, 514 S.E.2d 593, 596-97 (Ct. App. 1999).

The week before the single commissioner's hearing, Dr. Jerry Barron gave Barry a 15% impairment rating to his right shoulder. (Claimant's APA, p.77a). Dr. Barron said this

rating was enduring—he opined “Mr. Adickes has sustained *permanent impairment* of 15% to the right shoulder and 0% to the left shoulder.” *Id.* (emphasis added). He further explained Barry would probably require surgery in the future, but Dr. Barron believes it is reasonable for Barry to try to avoid surgery as long as possible. *Id.*

This is *not* the description of a patient whose condition has *yet* to plateau. Dr. Barron believes Barry has lost 15% of his right shoulder function—future surgery or not.

There is no contrary opinion in the record. No physician opined Barry is *not* at MMI. The Appellants did not send Barry for an independent medical evaluation, and the Workers’ Compensation Act gives the Appellants the power to direct Barry’s medical treatment, as this Court explained in *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 113-14, 576 S.E.2d 191, 197-98 (Ct. App. 2003) (discussing S.C. Code Ann. § 42-15-60 (Supp. ____)). The Appellants could have sent Barry to Dr. James Rentz, the authorized treating physician for his shoulders. They did not. Instead, Dr. Barron reviewed Dr. Rentz’s report and the MRI results, and Dr. Barron gave Barry a permanent rating. (Claimant’s APA, p.77a).

No authority holds that future surgery precludes a finding of MMI. Again, there are two ways an injured worker would be entitled to surgery. If surgery would help the *injury* improve, that would mean the injured worker is not at MMI. If surgery will not change the injury, but will nevertheless help alleviate the injury’s symptoms, that surgery will be proper even though the injured person is already at MMI. This Court’s decision in *Pearson v. JPS Converter & Indus. Corp.* describes these principles. 327 S.C. 393, 397, 489 S.E.2d 219, 221 (Ct. App. 1997). Yes, Barry may need surgery, but Dr. Barron’s opinion supports the commission’s decision; the decision is not clearly erroneous.

- b. Multiple experts gave evidence that Barry has a cognitive deficiency preventing him from earning wages like he earned at Phillips.

The Workers' Compensation Act is designed to compensate injured workers for the reduction in their earning capacity caused by on-the-job injuries. *Singleton v. Young Lumber Co.*, 236 S.C. 454, 470, 114 S.E.2d 837, 845 (1960). When an injured worker suffers an injury that is isolated to a single body part, it is commonly called a "scheduled injury." Compensation for scheduled injuries is awarded under S.C. Code Ann. § 42-9-30 (Supp. ____) because the Legislature has conclusively presumed the loss of earning capacity for those injuries. *Wigfall v. Tideland Utils.*, 354 S.C. 100, 107, 580 S.E.2d 100, 103 (2003).

When an injured worker suffers multiple injuries, the worker is not limited to the schedule and may offer evidence to prove the extent to which his or her earning capacity has been diminished. This is because the disabling effect of multiple injuries may be greater than the sum total of the scheduled allowances. *Singleton* and *Wigfall* are two of the principal cases on this issue, and Barry brought this type of claim. See (Form 50). He has multiple injuries and he says those injuries left him with a permanent wage loss.

Barry's monetary award is detailed in finding #50 and conclusion #2 of the hearing commissioner's order. (Hr'g Comm'r Or., pp.17-18). The panel's decision repeats these paragraphs. (Panel Or., p.15).

The Appellants' only evidentiary challenge to this award is that no wage loss exists, period. Put differently, the Appellants do not claim the commission should have given Barry a slightly lower award, they claim it was clearly erroneous to give Barry anything but zero. Here again, the Appellants cannot carry their burden. The record forecloses it.

Joel Leonard's deposition is a useful starting point, because Mr. Leonard was deposed December 30, 2014, less than a month before the single commissioner's hearing in January. See (Leonard Depo., pp.1-96). As a consequence of this timing, the trial record was mostly complete: Mr. Leonard was able to review anything the parties presented to him and explain how particular evidence impacted his opinions that Barry has suffered a reduction in his earning capacity as a result of his work-related car wreck. This was a change; the deposition of Barry's treating neurologist and the results of Barry's neurological testing with Dr. Waid were not available at the time of Mr. Leonard's original vocational evaluation. See (Leonard Depo., p.42, l. 16 - p.43, l. 9) and (Claimant's APA, pp.35-47) (the vocational evaluation).

During the deposition, the Appellants emphasized multiple portions of Dr. Waid's neurological report, noting areas where there was no evidence of dysfunction. (Leonard Depo., p.53, line 14 - p.60, line 17). The Appellants eventually accused Mr. Leonard of focusing on one line of the report rather than the whole report. (Id.p.62, lines 8-11).

Mr. Leonard answered that he *was* considering Dr. Waid's entire report and he was addressing the issues the report identified. (Id.p.62, lines 12-19). He explained he read Dr. Waid's report as indicating Barry has cognitive deficits "Because he [Dr. Waid] cited them." (Id.p.60, lines 18-24).

The Appellants presented Mr. Leonard with evidence Barry was a substandard worker. (Id.p.22, line 18 - p.26, line 5). This "performance improvement plan" is in the record, see (Respt's APA, Ex. D), and like the remaining employment documents in the record, see (Claimant's APA, Exs. 2-5), it unsurprisingly discloses that Phillips—a sales company—is *overwhelmingly* concerned with "closing" sales. The Appellants said Barry's

behavior before the accident was the same as his behavior afterwards, and they emphasized their view that Barry was obviously not fired for poor performance, (Id.p.36, line 15 - p.38, line 15), even though they also explained Barry was a poor sales performer who they moved to a less-complicated position shortly before his wreck. (Id.p.33, line 17 - p.35, line 8).

Again, Mr. Leonard disagreed. He noted that there were glowing statements about Barry in some of his employment records, and he also read the employment records as suggesting a decline in Barry's abilities after the crash. (Id.p.39, line 17 - p.40, line 6); (Id.p.69, line 24 - p.70, line 7). When discussing Barry's move to a new position at Phillips, Mr. Leonard explained that if this transition was indeed a reduction in responsibility, as the Appellants claimed it was, Barry's further decline following that move could suggest a *greater* degree of cognitive dysfunction. (Id.p.70, lines 10-23).

Mr. Leonard explained that high intelligence makes it more difficult for cognitive testing to reveal deficits. (Id.p.72, lines 20-25). He explained Barry's termination was immaterial to his opinion about Barry's wage loss in light of the evidence from Dr. Mandel and Dr. Waid. (Id.p.89, line 8 - p.90, line 18). Mr. Leonard also had to correct the Appellants for misstating his opinions. (Id.p.71, lines 2-9); (Id.p.95, line 25 - p.96, line 7).

Dr. Mandel's deposition is equally supportive. Dr. Mandel is the neurologist who treated Barry continuously since April of 2011, about 2 weeks after the wreck. (Claimant's APA, pp.97-132) (Mandell's records, in reverse chronological order). He explained he initially believed Barry had a good prognosis and was doing "ok" except for persistent headaches, but that the cognitive issues emerged over time. (Mandell Depo, p.7, line 17 - p.8, line 8); (Id.p.18, lines 5-25). Barry would not admit these, but Barry's wife kept a

journal and provided Dr. Mandel with examples. (Id.p.19, lines 1-21). Dr. Mandel explained Barry has diminished ability to multi-task, that Barry's headaches could cause him to miss work, that Barry's deficits could limit his employment at a high level, and that Barry would require a job where he has more time. (Id.p.36, line 23 - p.37, line 17). Dr. Mandel believed his opinion was consistent with Dr. Waid's report and that Dr. Waid's report said exactly what Dr. Mandel was saying. (Id.p.34, lines 6-11) also (Claimant's APA, pp.1-9). All of these experts agree, yet the Appellants insist the experts are all misreading each other.

Reasonable minds can often reach different conclusions when reading a record *de novo*, but that is not the standard of review, as the Supreme Court recently reiterated in *Hartzell v. Palmetto Collision*. Under the substantial evidence standard, appellate courts "must not engage in fact-finding that would disregard the Commission's factual findings[.]" 415 S.C. 617, ___, 785 S.E.2d 194, 197 (2016).

The hearing commissioner specifically explained he had read the file, and he also cited these experts in his decision. (Id.p.11, ¶8; p.12, ¶19; p.13, ¶20; p.14, ¶32). There is also the impairment rating; nobody contests Barry received a 15% rating *to his brain*. (Mandell Depo., p.41, line 20 - p.42, line 13); (Claimant's APA, p.96). There is ample evidence supporting the commission's decision that Barry has a cognitive deficiency limiting his earning capacity. Under the substantial evidence standard, the Court should affirm.

II. The commission properly construed the partial disability statute to allow Barry 340 weeks of benefits.

Awards for permanent partial disability are governed by section 42-9-20 of the South Carolina Code. In pertinent part, the statute explains "in no case shall *the period for such*

compensation be greater than three hundred forty weeks from the date of the injury.” (Emphasis added). The statute also explains that when the partial disability begins after a period of total disability, the period of total disability “shall not be deducted from the maximum period allowed [by the statute] for partial disability.”

The statute means partial disability awards are capped at 340 weeks. This is different from total disability awards, which are capped at 500 weeks unless the injury qualifies for lifetime benefits. See S.C. Code Ann. § 42-9-10 (A) & (C) (Supp. ____). Barry is entitled to 340 weeks of benefits because he has a permanent, partial disability. That is how the relevant provision operates.

The Court need not take Barry’s word for this. *Bass v. Kenco* dealt with an injured worker who received temporary total disability benefits after reaching MMI and was awarded 340 weeks of permanent partial disability benefits afterwards. 366 S.C. 450, 456, 622 S.E.2d 577, 580 (Ct. App. 2005). Relying on the statute, this Court explained that the employer was not entitled to a credit for the temporary benefits that were paid *after* MMI and *after* the date of the injury. *Id.* at 465-466, 622 S.E.2d at 585. The commission’s award was for 340 weeks of benefits, not 340 weeks minus the number of weeks that had passed from the date of the workers’ injury. *Id.* at 456, 622 S.E.2d at 580.

Under the Appellants’ view, the statute punishes someone like Barry—someone who goes back to work and whose wage loss is not readily evident. And the longer an injured worker takes to get to MMI, the less weeks of permanent benefits they will get. Remember also that the Appellants’ first argument is Barry is *not* at MMI. This is not surprising—they think postponing an award leads to a diminished obligation to pay Barry’s claim.

Barry's wage loss revealed itself gradually. His best year of earnings was 2010, the year before the injury, when his gross pay was nearly \$132,000. (Respt's APA, Ex. B11). This was down to \$118,500 in 2011 (when he missed a month of work), \$125,000 in 2012, \$115,000 in 2013, and Barry was terminated in January of 2014. (Id., Ex. B12-14). Barry's base salary at Phillips was \$80,000 with the opportunity for bonuses. (Id., Ex. A08). The base salary at his next job was \$55,000. (Id., Ex. G42).

This was the point when Barry's wage loss claim ripened. Barry lost his job at Phillips and he could not find comparable employment because of his disability. The commission explained this in its decision. (Panel Or., pp.14-15, ¶¶46-50). The "injury" to Barry's wage loss occurred when he could not longer find a similarly paying job because of his diminished executive function.

A comparable scenario was present in *Swilling v. Pride Masonry of Gaffney*. Though the issue there was different—it involved average weekly wage—the similarity is that like Barry, the injured worker in *Swilling* returned to work and delayed filing a claim. 401 S.C. 178, 181-183, 736 S.E.2d 672, 674-675 (Ct. App. 2012). This scenario seems like it will be unusual, but whether it is common or not does not matter. Section 42-9-20's purpose is to allow for a maximum of 340 weeks of benefits, and as the Supreme Court explained last year, the Workers' Compensation Act is *not* read strictly, as the Appellants suggest. The Act is read liberally; its limitations and restrictions are read narrowly. *Lewis v. L.B. Dynasty*, 411 S.C. 637, 641, 770 S.E.2d 393, 395 (2015).

Barry is entitled to 340 weeks of benefits because he has a permanent, partial disability. That is how section 42-9-20 operates, as the commission properly held.

CONCLUSION

This Court should affirm. First, there is ample evidence supporting the commission's decision that this case was ripe for a hearing. Second, the expert testimony supports Barry's claim. Finally, the commission did not err in construing the partial disability statute (section 42-9-20) to allow Barry 340 weeks of benefits. The commission did not have to rule for Barry, but it chose to do so. The substantial evidence standard controls and the Court should affirm.

June 17, 2016

Respectfully submitted,



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