THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0901375

Kimberly Walker, Claimant, ... Appellant,

v.

Sunbelt Human Advancement, Employer, and
State Accident Fund, Carrier, ... Respondents.

PETITION FOR REHEARING

The Appellant, by and through her undersigned attorney, hereby files this Petition for Rehearing. On December 21, 2016, this Court issued an opinion affirming the Decision and Order of the South Carolina Workers' Compensation Commission. Walker v. Sunbelt Human Advancement, Op. No. 2016-UP-529 (S.C.Ct.App. filed December 21, 2016).

As grounds for granting her Petition, Appellant would respectfully show the Court may have overlooked or misapprehended the issues of (1) the lack of substantial evidence to support the Commission's finding that Walker is not permanently and totally disabled when there were no conflicts in the medical and vocational evidence; (2) the Commission's arbitrary rejection of positive evidence and reliance on speculation and "sit and squirm" jurisprudence; (3) the arbitrary limitation of Walker's post-MMI medical care to palliative care; and (4) the Commission's preemptive holding that Walker's post-MMI knee surgery could not be a change of condition for the worse.

ARGUMENT

1. Kimberly Walker is permanently and totally disabled as there are no jobs available in the national or local economy to someone with the permanent restrictions provided to her by her treating doctors.

The Appellate Panel held:

> Claimant is not permanently and totally disabled. (We base this finding on the vocational opinion of Jan Westmoreland, the medical record as a whole, Claimant's education, and the evidence in the record as a whole). [R. p. 77, lines 2-4].

Appellant appealed this particular finding. The Court addressed the issue by referencing a body of case law regarding the substantial evidence standard of review. Most particularly, the Court cited the Corbin and Nettles cases for the proposition that the Commission weighs and resolves conflicts in the evidence: Corbin v. Kohler Co., 351 S.C. 613, 624, 571 S.E.2d 92, 98 (Ct. App. 2002) ("[T]he [c]ommission determines the weight and credit to be given to the expert testimony."); Nettles v. Spartanburg Sch. Dist. #7, 341 S.C. 580, 592, 535 S.E.2d 146, 152 (Ct. App. 2000) ("Where there is conflicting medical evidence, . . . the findings of fact of the commission are conclusive.").

Appellant believes the Court misapprehended the speculative nature of the Commission's finding, for in this case, there is no conflict in the evidence. Respondents' vocational expert, Jan Westmoreland, testified there are *no jobs in existence within the national or local economy* for someone with Walker's permanent work restrictions. When specifically asked: "So if you followed the restrictions provided to you by the authorized treating doctors, it would be your opinion, to a reasonable degree of vocational certainty, that there are no jobs available for Ms. Walker," Westmoreland replied: "That is correct." [R. p. 752, line 24-p. 753, line 4]. The Commission

cannot state it relied on "the vocational opinion of Jan Westmoreland" to find Walker is not permanently and totally disabled – not when Westmoreland testified to exactly the opposite of the Commission's finding. To disregard this expert's opinion – when it matches the opinion of Appellant's vocational expert (Rock Weldon) – is arbitrary and capricious. See Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011)(Commission is permitted to disregard medical evidence only when there is other competent evidence in the record to support its conclusion). The testimony of both experts conclusively proves that Walker is permanently and totally disabled.

The citation to Corbin and Nettles implies that the Court held there was a conflict in the testimony. Respectfully, this was not the case. Westmoreland and Weldon both opined that Walker was permanently and totally disabled.

The key to this case is the foundation for Westmoreland's opinion. In her report and parts of her deposition, Westmoreland engaged in "rank speculation" by giving her *personal opinion* that Walker was not disabled, rather than giving an *expert opinion*. The distinction is that a personal opinion has no probative value because it has no basis in the evidence. Conversely, an expert opinion is based on the foundation established by evidence. See Young v. Tide Craft, 270 S.C. 453, 468, 242 S.E.2d 671, 678 (1978)("It is, of course, elementary that the factual or underlying basis for the expert's opinion be set out, otherwise the opinion lacks probative value."). For a vocational expert, that evidentiary foundation is largely found in the medical evidence. A vocational expert is not qualified to opine on a disabled worker's medical restrictions. Medical restrictions are exclusively the province of the medical providers: doctors and physical therapists.

A vocational expert who disregards the medical evidence of the employee's residual capacity is speculating. See Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 504, 399 S.C. 381, 694 (2012)(reversing appellate panel because finding by the commission "based on rank speculation . . . cannot now be used as the basis for denying [an injured worker's] claim for lost wages.") If the Commission's cannot base its decisions on "the medical opinion of the single commissioner, adopted by the Commission," rather than on the opinion of a medical provider, then the same must necessarily apply to the opinion of a vocational expert. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012). See, also Hutson,732 S.E.2d 500, 399 S.C. 381 (2012)("To use such unsupported and wildly optimistic goals which are in direct conflict with the only concrete evidence in the record would turn the Act on its head and violate the stated policy behind it."); Michau v. Georgetown County, 396 S.C. 589, 723 S.E.2d 805 (2012)(reversing Commission's finding based on incompetent expert opinion and remanding for Commission to decide whether the remaining competent evidence supports employee's claim).

The fact that Westmoreland's *expert* opinion (based on the medical evidence) was that there are "none at this time" jobs available for someone with Walker's restrictions is conclusive proof of Walker's disability. [R. p. 752, line 14-p.753, line 4]. There is simply no way for the Commission to find otherwise based on the evidence in the record.

The Commission disregarded the overwhelming evidence of Walker's total disability by engaging in so-called "sit and squirm" jurisprudence. "In 'sit and squirm' jurisprudence, [a commissioner] who is not a medical expert will subjectively arrive at an index of traits which he expects the claimant to manifest at the hearing. If the claimant falls short of the index, the claim is denied." Wilson v. Heckler, 734 F.2d 513 (11th Cir. 1984). This approach "will not only result in

unreliable conclusions when observing claimants with honest intentions, but may encourage claimants to manufacture convincing observable manifestations of pain or, worse yet, discourage them from exercising their right to appear before [the commission] for fear that they may not appear to the unexpert eye to be as bad as they feel." Tyler v. Weinberger, 409 F.Supp. 776 (E.D. Va. 1976)(finding claimant disabled as a matter of law where factual finding that claimant "over-exaggerated his complaint about sitting for extended periods" was "unreasonable under the law and this Court does not accept them."). A hearing officer "may not arbitrarily substitute his own hunch or intuition for the diagnoses of a medical professional." Marbury v. Sullivan, 957 F.2d 837, 840-41 (11th Cir. 1992) (Johnson, J., concurring). Cf., Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012) (finding based on commissioner's own medical opinion is not substantial evidence and must be reversed).

Appellant respectfully requests that the Court reconsider its decision, reverse the Commission, and rule that Walker proved she is permanently and totally disabled as a matter of law.

2. The Appellate Panel erred in limiting Walker's medical treatment to "palliative care" and finding future surgery would not change her MMI status.

The Court affirmed the Appellate Panel's finding that "The future medical, outlined above, would not change her MMI status. They are palliative in nature and are designed to maintain her current level of functioning." [R. p. 77, lines 12-20]. The future medical explicitly included the seventh knee surgery Walker needed in the immediate future. However, the Court also added in a footnote "Contrary to Walker's argument, we find the commission's order does not preclude her from ever filing a change of condition; however, she would be required to meet the burden of proving a change of condition."

Appellant respectfully suggests that this ruling is inherently contradictory. Assuming, as the Commission found, that Walker is not permanently and totally disabled, then it must mean that she is (as of the hearing) capable of work. When she has the knee surgery, she will be written completely out of work by her doctor for some period of time – probably several weeks or months. While written out of work, she will be *temporarily totally disabled* until she reaches MMI from the surgery. As her disability will have become total due to her original injury, albeit temporary, she will have necessarily suffered a change of condition for the worse. See S.C. Code Ann. § 42—17–90(A) (2015). "A change in condition occurs when the claimant experiences a change in physical condition as a result of her original injury, occurring after the first award." Gattis v. Murrells Inlet VFW No. 10420, 353 S.C. 100, 109, 576 S.E.2d 191, 196 (Ct.App.2003). "Generally, an appeal of a workers' compensation order is concerned with the conditions prior to and at the time of the original award of the commission. Review for a change of condition is concerned with conditions that have arisen thereafter." Id. at 109, 576 S.E.2d at 195 (citation omitted).

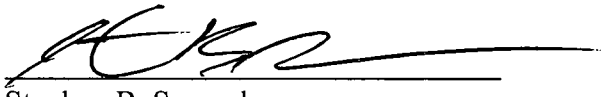
Furthermore, Walker is doubly prejudiced by the Commission's preclusion of her future knee surgery to be addressed as a change of condition. The Commission is prohibited from basing a partial disability award on a potential need for surgery. See Sanders v. Meadwestvaco Corp., 371 S.C. 284, 638 S.E.2d 66 (Ct. App. 2006)("Appellate Panel incorrectly premised its award of 40% loss of use of the back on a potential need for surgery."). Even if the seventh surgery is unsuccessful and permanently changes her condition for the worse, she is precluded from litigating the issue because the Appellate Panel ruled – speculatively – that the future surgery would be palliative in nature. The Appellate Panel also erred in limiting her future treatment to this one operation.

The Appellate Panel's finding that the additional surgery will not change Walker's MMI status should be reversed, as should the finding that invasive treatment is limited to this one surgery. The findings are arbitrary, capricious and speculative, thus constituting an error of law.

CONCLUSION

For the foregoing reasons, the Decision and Order of the Appellate Panel should be reversed. The Court should reconsider its decision, reverse the Commission and hold Walker is entitled to compensation for permanent and total disability along with lifetime medical treatment. Even if the Court affirms the disability award, the Court should reverse the finding limiting medical treatment and potentially precluding a change of condition.

Respectfully Submitted



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Columbia, South Carolina
January 4, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kimberly Walker, Claimant, Appellant,

v.

Sunbelt Human Advancement, Employer, and State Accident Fund, Carrier, Respondents.

Appellate Case No. 2015-000692

Appeal From The Workers' Compensation Commission

Unpublished Opinion No. 2016-UP-529
Submitted November 1, 2016 – Filed December 21, 2016

AFFIRMED

Stephen Benjamin Samuels, of Samuels Law Firm, LLC, of Columbia, and Alton Lamar Martin, Jr., of Martin & Martin, P.A., of Greenville, for Appellant.

Lawson Brenn Watson, of Willson Jones Carter & Baxley, P.A., of Greenville, for Respondents.

PER CURIAM: In this workers' compensation action against Sunbelt Human Advancement, Employer, and State Accident Fund, Carrier, Kimberly Walker appeals the Workers' Compensation Commission's order, arguing the commission

erred in (1) finding she was not permanently and totally disabled despite the lack of jobs available to someone with her permanent restrictions, and (2) limiting her future medical treatment to palliative care. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to Walker's argument the commission erred in finding she was not permanently and totally disabled: *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 108-09, 580 S.E.2d 100, 104 (2003) ("South Carolina recognizes that a claimant may be totally disabled even though he is not altogether incapacitated if such an injury prevents him from obtaining regular employment in the labor market."); *Coleman v. Quality Concrete Prods., Inc.*, 245 S.C. 625, 628-29, 142 S.E.2d 43, 44 (1965) (finding total disability does not require complete helplessness; rather, it is an inability to perform services other than those that are so limited in quality, dependability, or quantity that no reasonably stable market exists for them); *id.* at 630, 142 S.E.2d at 45 (explaining the burden is on the claimant to prove total disability); *id.* at 630-31, 142 S.E.2d at 45 ("[Such] [a]n award . . . may not rest on surmise, conjecture or speculation and must be founded on evidence of sufficient substance to afford a reasonable basis for it."); *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 107, 576 S.E.2d 191, 195 (Ct. App. 2003) ("The Administrative Procedures Act establishes the substantial evidence standard of review for factual findings made by the commission."); *Laws v. Richland Cnty. Sch. Dist. No. 1*, 270 S.C. 492, 495-96, 243 S.E.2d 192, 193 (1978) ("'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 that the administrative agency reached or must have reached in order to justify its action."); *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004) ("The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence."); *Corbin v. Kohler Co.*, 351 S.C. 613, 624, 571 S.E.2d 92, 98 (Ct. App. 2002) ("[T]he [c]ommission determines the weight and credit to be given to the expert testimony."); *Nettles v. Spartanburg Sch. Dist. #7*, 341 S.C. 580, 592, 535 S.E.2d 146, 152 (Ct. App. 2000) ("Where there is conflicting medical evidence, . . . the findings of fact of the commission are conclusive.").

2. As to Walker's argument the commission erred in limiting her future medical treatment to palliative care: *Gadson v. Mikasa Corp.*, 368 S.C. 214, 222, 628 S.E.2d 262, 267 (Ct. App. 2006) (concluding that although maximum medical improvement (MMI) is defined as a person that has reached a plateau such that no

further medical care will lessen the degree of impairment, a finding of MMI does not preclude a finding that a claimant may still require medical care); *Dodge v. Bruccoli, Clark, Layman, Inc.*, 334 S.C. 574, 583-84, 514 S.E.2d 593, 598 (Ct. App. 1999) (explaining the issue of whether medical treatment after MMI will tend to lessen a claimant's period of disability is a question of fact to be decided by the commission); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) (stating the substantial evidence standard of review applies to questions of fact).[1]

AFFIRMED.[2]

HUFF and SHORT, JJ., and MOORE, A.J., concur.

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[1] Contrary to Walker's argument, we find the commission's order does not preclude her from ever filing a change of condition; however, she would be required to meet the burden of proving a change of condition. *See Krell v. S.C. State Highway Dep't*, 237 S.C. 584, 588, 118 S.E.2d 322, 323 (1961) (requiring a claimant to prove a change of condition and that the change was based upon a causal connection to the original compensable accident).

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

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Appellate Case No.: 2015-000692

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Sunbelt Human Advancement, Employer, and
State Accident Fund, Carrier, ... Respondents.

PROOF OF SERVICE

I certify that I, Katherine Carter, am a paralegal to Stephen B. Samuels and I have caused the **Petition for Rehearing** to be served upon counsel for the Respondents by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on January 5, 2017, addressed as follows:

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Willson Jones Carter & Baxley
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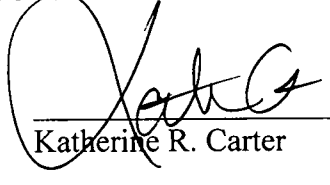

Katherine R. Carter

January 5, 2017
Columbia, South Carolina

SAMUELS LAW FIRM

STEPHEN B. SAMUELS
ANDREW J. BROWN
ATTORNEYS AT LAW

January 5, 2016

Via Hand Delivery
Jenny Abbott Kitchings, Clerk
The South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Kimberly Walker v. Sunbelt
Appellate Case No.: 2015-000692

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of **Petition for Rehearing** in the above-referenced matter. Also enclosed is a check in the amount of $25.00 for the filing fee. Please date stamp the extra copy of the Petition for our records.

By copy of this letter and enclosure to L. Brenn Watson and Page P. Snyder, counsel of record for the Respondents, we are serving them with a copy of our **Petition for Rehearing** as indicated by the enclosed Proof of Service.

Thank you for your consideration in this matter. Please contact us with any questions or if further information is needed from our office.

With kindest regards, I am

Sincerely,

Katherine R. Carter
Paralegal for Stephen B. Samuels

/krc

cc: Alton L. Martin, Jr., Esq.
L. Brenn Watson, Esq.
Page P. Snyder, Esq.