

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SC Court of Appeals

Appellate Case No.: 2015-000692

Kimberly Walker, Employee,Appellant,

v.

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

**RESPONDENTS' RETURN TO
PETITION FOR REHEARING**

On December 21, 2016, this Court issued an Opinion, affirming the March 4, 2015, Decision and Order of the Appellate Panel of the South Carolina Workers' Compensation Commission. Op. No. 2016-UP-529 (S.C.Ct.App. filed December 21, 2016). Appellant filed a Petition for Rehearing with this Court on January 5, 2017, asserting that this Court overlooked or misapprehended issues in affirming (1) the Commission's finding that Appellant is not permanently and totally disabled, and (2) the Commission's limiting Appellant's future treatment and finding that a future surgery would

not change Appellant's MMI status. Respondents respectfully submit this Return to Appellant's Petition for Rehearing.

ARGUMENTS

I.

SUBSTANTIAL EVIDENCE SUPPORTS THE APPELLATE PANEL'S FINDING THAT APPELLANT IS NOT PERMANENTLY AND TOTALLY DISABLED.

Appellant incorrectly asserts that there is no conflict in the evidence pertaining to Appellant's employability, arguing that both vocational experts in the claim opined that Appellant is permanently and totally disabled. The key issue surrounding Appellant's Petition for Rehearing is the assertion that Jan Westmoreland's vocational opinions represent "personal opinions," rather than "expert opinions," because Ms. Westmoreland did not rely solely on the work restrictions assigned by Appellant's doctors in arriving at her final vocational opinion. Appellant cites no authority or evidence to prove the argument that an expert vocational opinion must be limited to the specific work restrictions assigned by a medical provider. Without any such authority, Jan Westmoreland's expert vocational opinion cannot be called a "personal opinion," and it must be taken for exactly what it is; an "expert opinion" stated to a reasonable degree of vocational certainty.

Ms. Westmoreland performed a vocational evaluation of Appellant on February 4, 2014, and she was deposed by Counsel for the respective parties on February 10, 2014. (R. pp. 732-743, 744-786) Ms. Westmoreland's testimony makes clear that her professional vocational opinion is based on a multitude of factors; only one of which is a patient's assigned work restrictions.

Upon initial questioning by Appellant's Counsel during her deposition, Ms. Westmoreland testified that if the restrictions placed by the physicians were the only factor considered in developing her vocational opinion, her opinion would be that there are no jobs available for Appellant. *However*, Ms. Westmoreland testified that, in evaluating an individual and forming a vocational opinion, she does not simply look at the restrictions from doctors; she also bases her opinion on her interaction with the individual. (R. p. 750, lines 11-20)

Ms. Westmoreland testified that she is familiar with FCEs and reviews them often in her role as a vocational evaluator. (R. p. 758, line 4 – p. 759, line 15) Ms. Westmoreland testified she would expect someone with sub-sedentary capability (the capability level found by Appellant's FCE) to basically sit in a recliner or lay down most of the day. (R. p. 760, line 4 – p. 761, line 12) She testified that, if a person can do more than sit in a recliner and lay down most of the day, her opinion as a vocational expert would be that the individual's functional abilities exceed sub-sedentary capability. (*Id.*) Ms. Westmoreland testified that she found that Appellant is capable of sedentary work based on her opinion as a vocational expert. (R. p. 749, lines 15-18)

Ms. Westmoreland testified that, when she completed her vocational report of Appellant, Ms. Westmoreland was operating under the assumption that the sub-sedentary classification assigned by the October 2012 FCE represented *a floor* for Appellant's capabilities, *not a ceiling*. (R. p. 761, lines 13-17) In her role as a vocational expert, is evident that Ms. Westmoreland views an FCE as the minimum that a patient can perform, but she evaluates numerous other factors to determine whether each patient is capable of more *from a vocational standpoint*. Ms. Westmoreland testified that she also considers a

patient's age in evaluating vocational abilities, and Appellant was forty-five (45) years old at the time of her vocational evaluation; an age that is not an impediment to Appellant returning to work. (R. p. 762, lines 19-24) As another example of additional factors used in assessing Appellant's vocational abilities, Ms. Westmoreland testified that Appellant reported that she supervised eighteen (18) other employees in her job for the Respondent-Employer, which Ms. Westmoreland testified represents a reasonably high level of executive function, requires some degree of intelligence, and requires some degree of skill. (R. p. 768, line 25 – p. 769, line 20)

Perhaps most importantly, Ms. Westmoreland testified she has encountered other individuals with greater restrictions than those assigned by the October 2012 FCE who are able to work, and who *are* working, clearly evidencing that a vocational assessment *cannot* be based solely on work restrictions assigned by a patient's doctors. (R. p. 771, lines 7-18) After all, if a vocational opinion was based solely on restrictions assigned by a doctor, there would be no need for the vocational opinion.

After questioning by the parties, Ms. Westmoreland testified that it is her professional opinion *stated to a reasonable degree of vocational certainty* that Appellant can perform the jobs listed in her vocational report, as Appellant has the education, the work experience, the intellect, the functioning, and the physical ability to perform those jobs. (R. p. 773, line 18 – p. 774, line 11) Ms. Westmoreland further testified that she stands by her expert opinion that Appellant remains employable *to a reasonable degree of vocational certainty*. (R. p. 774, line 12 – p. 775, line 2)

Appellant argues that the underlying basis for an expert's opinion must be set out or it will otherwise lack probative value, but Appellant concedes that a vocational expert's

opinion is not based solely on restrictions assigned by a patient's doctors.¹ In this case, Jan Westmoreland provided her expert vocational opinion *stated to a reasonable degree of vocational certainty*. She provided testimony outlining numerous factors and forms of information that she considered in arriving at her expert vocational opinion, including Appellant's age, work experience, intellect, functioning, and her interactions with Appellant. Appellant provides no authority for the assertion that Ms. Westmoreland's opinion is not an "expert opinion" merely because it is not restricted to the work restrictions assigned by the doctors, and the expert opinion of Jan Westmoreland finding that Appellant remains employable represents substantial evidence to support the Appellate Panel's finding that Appellant is not permanently and totally disabled.

Even without the opinion of Jan Westmoreland, the Appellate Panel is not bound by the opinion of medical experts. "No fact finding body is compelled to blindly accept an expert's opinion. While there may be circumstances where medical testimony is conclusive, ordinarily such opinions, although uncontradicted, are not conclusive in the sense that they must be accepted as true. They may be rejected if found inconsistent with the facts or otherwise unreasonable." Wyndham v. City of Florence, 221 S.C. 350, 359, 70 S.E.2d 553, 556 (1952); citing Anderson v. Campbell Tile Co., 202 S.C. 54, 24 S.E.2d 104; In re Crawford, 205 S.C. 72, 30 S.E.2d 841; Poston v. Southeastern Construction Co., 208 S.C. 35, 36 S.E.2d 858; Kilpatrick v. Brotherhood of Railroad Trainmen Insurance Department, 210 S.C. 379, 42 S.E.2d 891. Similarly, the Commission determines the weight and credit to be given to the expert testimony. Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. at 340, 513 S.E.2d at 846 (1999). Once admitted, expert testimony is to

¹ Appellant notes that the evidentiary foundation for a vocational expert's opinion "...is largely found in medical evidence," implicitly acknowledging that medical evidence is not the sole basis for a vocational expert's opinion. (Petition for Rehearing, p. 3)

be considered just like any other testimony. Tiller, 334 S.C. at 340, 513 S.E.2d at 846. Although medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record. Hargrove v. Titan Textile Co., 360 S.C. at 294, 599 S.E.2d at 613; *see* Tiller, 334 S.C. at 340, 513 S.E.2d at 846 (confirming that medical testimony should not be held conclusive irrespective of other evidence).

The Appellate Panel "may find a degree of disability different from that suggested by expert testimony." Lyles v. Quantum Chem. Co., 315 at 445, 434 S.E.2d at 295. Expert medical testimony is merely intended to aid the Appellate Panel in coming to the correct conclusion. Corbin v. Kohler Co., 351 S.C. 613, 624, 571 S.E.2d 92, 98 (Ct.App.2002) (citing Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 513 S.E.2d 843 (1999)). As to the extent of disability, "it is not for this court to balance objective against subjective findings of medical witnesses, or to weigh the testimony of one witness against that of another. That is the function of the Commission alone." Long v. Atlantic Homes, 311 S.C. 237, 428 S.E.2d 711 (1993). The Court of Appeals may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact. Shealy, 341 S.C. at 455, 535 S.E.2d at 442.

The FCE and restrictions assigned by the doctors were found to be questionable by the Appellate Panel in light of Appellant's obvious lack of credibility. Respondents asserted at the Commission level, and continue to assert today, that Appellant's lack of credibility is the most important aspect of this claim. When much of the medical and other evidence is viewed in light of Claimant's lack of credibility, it is clear that substantial evidence supports the Commission's Order, and the Appellate Panel was not required to blindly accept the medical opinions or reports.

Appellant has a high school diploma, a bachelor's degree, and a master's degree, and the Appellate Panel specifically noted that Appellant's education formed part of the basis for their finding. Further, the FCE which formed the basis for the work restrictions assigned by the doctors was performed *prior* to Appellant reaching MMI (i.e., before she had stopped improving), and Dr. Math noted in reference to the FCE that he "spoke with therapist performing test who felt as though the pt. ... would likely be able to do more if she went through a formal work hardening program." (R. p. 294) The FCE and the assigned restrictions are inherently unreliable, and the Appellate Panel was not required to blindly accept the medical opinions in the face of other evidence; evidence which included Appellant's own admission that she believed she was capable of working at the time she filed her EEOC claim in May of 2013.

The Appellate Panel properly found Appellant is not permanently and totally disabled, and this Court did not err in finding that substantial evidence supports the Appellate Panel's Decision and Order.

II.

THE APPELLATE PANEL PROPERLY LIMITED APPELLANT'S FUTURE MEDICAL TREATMENT AND FOUND THAT FUTURE SURGERY WOULD NOT AFFECT APPELLANT'S MMI STATUS.

At the hearing before the Single Commissioner, Appellant specifically argued that she was at MMI and that future surgery would not affect her MMI status. Leading up to the hearing, Appellant argued, either expressly or impliedly, that she had reached MMI:

1. Appellant's Form 50, Request for Hearing, specifically alleged she was permanently and totally disabled (which must follow a finding of MMI). (R. p. 107)

2. Appellant's Form 58, Pre-hearing Brief, specifically alleged she was permanently and totally disabled, "per 42-9-10." (Again, permanent disability follows MMI) (R. pp. 121-124)
3. Appellant's Pre-hearing Brief further stated: "She has been placed at MMI by the authorized treating knee surgeon, authorized treating pain management doctor treating her back, and authorized treating psychologist...[Appellant] seeks an award of Permanent and Total Disability." (R. p. 123)
4. Appellant's Pre-hearing brief further stated: "The authorized knee surgeon has recommended another arthroscopic procedure. *However, it is that same doctor's opinion that [Appellant] remains at MMI. [Appellant] will most likely need treatment and possible arthroscopic procedures to her left knee for the remainder of her life...Moreover, [Respondents'] authorized surgeon has stated to a reasonable degree of medical certainty that despite her need for the left knee procedure, she remains at MMI.*" (R. p. 123, emphasis added)

Similarly, in Appellant's attorney's opening statements at the Single Commissioner hearing, he stated: "**It's our position that she is at maximum medical improvement**, and that she is totally and permanently disabled, and we would like an award for that today." (R. p. 792, lines 19-22, emphasis added)

Just as she had argued in her Form 50, in her Pre-hearing Brief, and in her attorney's opening statement, Appellant testified during direct examination at the Single Commissioner hearing that she understood the additional surgery being recommended to be maintenance treatment:

Q: Is it your understanding that you've been placed at maximum medical improvement by Dr. Piasecki?

A: Yes. (R. p. 802, lines 6-8)

Q: Is it your understanding that another surgery will improve your knee and help you get better?

A: No.

Q: What's your understanding?

(Objection to question overruled)

A: It's not going to get better. But the surgeries that I need is going to help it – help me maintain the level of pain that I'm now so that it won't get any worse. It won't digress. But – but healing is not an option. Just to keep me functional, I guess is a good way to put it. I don't know.

Q: Is it your understanding or what do you know about whether or not you will need any more surgeries?

A: It's my understanding I will need surgery for the rest of my life.

Q: So this number seven that's being recommended won't be the last one?

A: No. (R. p. 809, line 18 – p. 810, line 18)

At the hearing before the Single Commissioner, Appellant's testimony was tailored to support her contention that any future surgeries she required, *specifically including the seventh surgery being recommended by Dr. Piasecki*, would merely be maintenance treatment and would not affect her MMI status. In fact, she even testified she would likely require additional surgeries for the rest of her life, and she submitted a questionnaire into evidence signed by Dr. Piasecki specifically opining that Appellant remained at MMI, despite the ongoing surgical recommendation.

After Appellant was not found permanently and totally disabled by the Single Commissioner, Appellant reversed course on her arguments. On appeal to the Appellate Panel, Appellant alleged “it is impossible to find [Appellant's] MMI status will not be affected by surgery before the surgery occurs...Until the [Appellant] has reached maximum healing following surgery, she will not be at MMI.” (R. p. 706) This argument, and Appellant's current argument that the future surgery must affect her MMI status, are in direct contravention with her argument to the Single Commissioner, whereby Appellant insisted she was at MMI and the seventh surgery being recommended was merely future/maintenance treatment.

It was certainly not error for the Appellate Panel to find that Appellant had reached MMI, and that the surgery recommended by Dr. Piasecki was to be included in Appellant's future medical treatment, the very findings Appellant argued for to the Single Commissioner.

In support of her current argument, Appellant argues she cannot be at MMI *and* be entitled to the seventh surgery because she would be entitled to temporary disability benefits for times she is written out of work following future surgeries. However, it is elementary that Appellant is no longer entitled to *temporary* disability benefits after she has reached MMI. After MMI, Appellant is *permanently* disabled, and her entitlement to temporary disability benefits ceases. Smith v. S.C. Dept. of Mental Health, 335 S.C. 396, 517 S.E.2d 694, rehearing denied (1999). The Appellate Panel may order future treatment after the date of MMI to maintain a claimant's degree of physical impairment, and that is what the Appellate Panel has done in this case. Hall v. United Rentals, Inc., 371 S.C. 69, 636 S.E.2d 876 (Ct.App.2006). If Appellant's position was correct, the Commission could never award a surgery as future medical treatment unless a claimant was permanently and totally disabled; a clearly absurd result.

Appellant also argues it was error for the Appellate Panel to specifically detail the award of future medical treatment, and to preclude any additional invasive procedures from the future medical treatment. In cases of permanent partial disability (such as this case), the Commission is *required* to detail an award of future causally-related medical treatment with as much specificity as possible. The applicable statute is S.C. Code Ann. Section 42-15-60, which states the following:

(B)(2) Each award of permanency as ordered by the single commissioner or by the commission must contain a finding as to

whether or not further medical treatment or modalities must be provided to the employee. If the employee is entitled to receive such benefits, *the medical treatment or modalities to be provided must be set forth with as much specificity as possible in the single commissioner's order or the commission's order.* (emphasis added)

The Appellate Panel appropriately reviewed the evidence in the claim (including the opinion of Dr. Piasecki that Appellant would remain at MMI regardless of surgery) and set forth the causally-related future medical treatment with as much specificity as possible. The Appellate Panel found the following:

[Appellant] is entitled to future medicals for her left knee which would tend to lessen her period of disability, as ordered by the authorized treating physician, Dr. Piasecki. This would include the modalities described under PLAN in his medical note of October 2, 2013. The future medicals would also include oral medications, injections (even though [Appellant] testified they do not work for her), as well as braces or other orthopedic devices. The future medicals are not to be interpreted to include other invasive procedures beyond those specifically detailed in the medical note of October 2, 2013. (R. p. 77)

The future medicals, 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)

[Appellant] is also entitled to a work-hardening program of [Respondents'] choosing, should an authorized treating physician order it. (R. p. 77)

The Appellate Panel reviewed the medical evidence, including the recommendations of Dr. Piasecki, and appropriately delineated the future medical treatment. There being no opinion or recommendation for any additional or future invasive procedures beyond the seventh surgery being recommended by Dr. Piasecki, and in light of the fact that Dr. Piasecki and the other doctors had all indicated Appellant had reached MMI, the Appellate Panel appropriately found no basis for inclusion of any additional invasive procedures in Appellant's future medical treatment. In fact, to have ordered any additional invasive procedures would have been purely speculative. The

Appellate Panel's findings are "text book;" there is no error in the award of future medicals.

Appellant's final argument is that she is prejudiced because her future knee surgery cannot be addressed as a change of condition claim. Appellant cites no authority for this argument; likely because no such authority exists. If Appellant believes that "the seventh surgery is unsuccessful and permanently changes her condition for the worse," the Order of the Commission does not preclude her from filing a change of condition claim to make this argument. As was properly pointed out by this Court in the December 21, 2016, Opinion, "...the Commission's Order does not preclude [Appellant] from ever filing a change of condition; however, she would be required to meet the burden of proving a change of condition." Op. No. 2016-UP-529, FN No. 2.

If Appellant's position was adopted, it would mean that the Commission could *never* include a future surgery as part of a claimant's future medical care where permanent partial disability resulted from an accident. As an example of such an absurd result, imagine a claimant who injures a knee, undergoes a total knee replacement, is placed at MMI, and the surgeon opines that a replacement procedure for the total knee will most likely be required in the future. If the claimant was found to have suffered permanent partial disability by the Commission, the Commission could not award the future total knee replacement under Appellant's reading of the law. This would clearly lead to an absurd result, and this Court properly found that the award of the surgery as future medical care does not preclude Appellant from pursuing a change of condition claim.

CONCLUSION

For the reasons stated above, Respondents respectfully request an Order denying Appellant's Petition for Rehearing.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.

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January 16, 2017

THE STATE OF SOUTH CAROLINA
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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2015-000692

Kimberly Walker, Employee,Appellant,


v.

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

PROOF OF SERVICE

I, Cheri Evans Coon, certify that I have served the **Respondents' Petition for Rehearing** on January 16, 2017 by depositing a copy of it in the United States Mail, postage prepaid, on January 16, 2017, addressed to her attorney(s) of record, Alton L. Martin, Jr., Martin & Martin, P.O. Box 8220, Greenville, SC 29604 AND Samuels Law Firm, LLC, 1320 Richland Street, Columbia, SC 29201. I also served the **Respondents' Petition for Rehearing** by depositing a copy of it in the United States Mail, postage prepaid, on January 16, 2017, addressed to Jenny Abbott Kitchings, Clerk of Court, The South Carolina Court of Appeals, Post Office Box 11629, Columbia, South Carolina, 29211.

January 16, 2017



Cheri Evans Coon, Legal Assistant
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January 16, 2017

Jenny Abbott Kitchings, Clerk
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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JAN 19 2017

SC Court of Appeals

Re: Kimberly Walker vs. Sunbelt Human Advancement
APPELLATE CASE NO: 2015-000692
WCC File No.: 0901375 DOI: 2/19/2009
Carrier: State Accident Fund - Claim No.: 2009-703
WJC&B File No.: 0385.00587

Dear Ms. Kitchings:

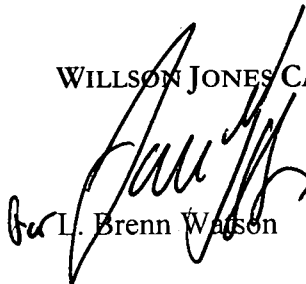
Enclosed for filing please find the original and seven (7) copies of the **Respondents' Return to Petition for Rehearing** in the above-referenced matter. Please date stamp the extra copy of the **Petition** for our records and return it in the self-addressed stamped envelope provided.

By copy of this letter and enclosure to Alton Martin and Stephen Samuels, counsel of record for the APPELLANTS, we are serving them with a copy of our **Respondents' Return to 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,

WILLSON JONES CARTER & BAXLEY, P.A.


for L. Brenn Watson

LBW/cec
Enclosures

Mr. Alton L. Martin, Jr., Esquire
Mr. Stephen B. Samuels, Esquire
Ms. Page P. Snyder, Esquire, (via e-mail)
Ms. Meggan Damiano, (via e-mail)