

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2015-000692

RECEIVED

JAN 24 2017

SC Court of Appeals

Kimberly Walker, Claimant, Appellant,

v.

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

REPLY TO RESPONDENTS' RETURN TO PETITION FOR REHEARING

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 [In Reply to Respondents' Argument at pages

The crux of the error made by the Commission was in ignoring the testimony of Jan Westmoreland, Respondents' vocational expert, wherein she testified ". . . if [she] followed the restrictions provided to [her] by the authorized treating doctors" in her professional "opinion, to a reasonable degree of vocational certainty, . . . there are no jobs available for Ms. Walker." [R. p. 752, line 24-p. 753, line 4]. In response, Respondents argue that Westmoreland testified elsewhere in her deposition "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. [Respondents' Return, page 4, paraphrasing Westmoreland's testimony at R. P. 773, line 18- p. 774, line 11]. From this stark contradiction in the Westmoreland's testimony, this Court cited to case law holding that conflicts in the testimony of a witness are to be resolved by the Commission, thus requiring the decision below to be summarily affirmed.

There are really only two conclusions that can be drawn from such diametrically opposite testimony from an expert – both of which are subject to review by this Court. Perhaps the expert will simply say anything so long as it is favorable to the party who retained her.¹ If so, the testimony is altogether incompetent and should be disregarded altogether. The second conclusion– which is the focus of this appeal – is that one of the opinions is based on an evidentiary foundation, while the other is speculation. 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.”).

Can the Commission simply act arbitrarily and pick the opinion it likes? Or must the Commission, as the trier of fact, delve deeper into the foundation for each opinion? The answer to

¹Westmoreland is an employee of The Directions Group – a company providing “Medical and Vocational Case Management” to the insurance industry. [R. Page 732]. See Yoho v. Thompson, 345 S.C. 361, 548 S.E.2d 584 (2001)(expert's connection to insurer is admissible as evidence of bias). At times, Westmoreland's testimony bordered on farce, as when she testified “I've known plenty of quadriplegics, paraplegics, the other disabilities that do go to a trainer and do work or have the desire to work.” [R. P. 778, lines 6-10]. She also testified it would not be a bit of a stretch to opine that Walker is capable of doing sedentary or greater work because she went to the gym with a trainer and went to physical therapy. [R.p. 779, line 8-page 789, line 9].

that query is well established black letter law: *every* expert opinion must be based on an evidentiary foundation. 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.”).

Respondents argue “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.” [Respondents’ Return, page 2]. Respondents are simply wrong in this allegation. Hutson and Young stand for the proposition that both the Commissions’ findings and an expert’s opinion must have a foundation based on evidence in the record. Without such a foundation, any conclusion or opinion is mere speculation. An expert witness “must show that in formulating his opinion, he has taken into consideration the material facts of the case being tried which was necessary to the formation of an intelligent opinion.” Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978)

For a vocational expert giving an opinion on whether there is work available to a person with physical impairments, the *sine qua non* of the analysis begins with the person’s residual physical

capabilities.² Westmoreland testified unequivocally that there were no jobs in the local or national economy for someone with Walker's physical limitations. [R. p. 752, line 24-p. 753, line 4].

Respondents' argument posits that Westmoreland can simply disregard the medical restrictions and substitute her own opinion on the Walker's post-injury physical capabilities for those of the doctors. She cannot; it is beyond her area of expertise. Westmoreland conceded she is not qualified to test a person's lifting, pushing, pulling and walking abilities (all of which were tested in the FCE). [R. Pa. 776, lines 1-22]. As such, her testimony that Walker could perform a sedentary job is based on her own speculative personal opinion. Indeed, Westmoreland is engaging in a version of the same "sit and squirm" jurisprudence followed by the Commission in this case. Neither a vocational expert nor a commissioner may "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

²In a footnote, Respondents argue Appellant's argument is "implicitly acknowledging that medical evidence is not the sole basis for a vocational expert's opinions." [Return, page 5n1]. Certainly a vocational expert considers other factors in the final analysis (age, education, transferable skills, etc.). However, the first step is always determining the physical demand level at which the injured worker is capable of performing. Indeed, if there were no physical restrictions resulting from the injury, there would be no need for vocational analysis, as the employee could *ipso facto* return to his previous employment. A vocational expert's expertise lies in determining whether a person with physical restrictions is unable 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." See, e.g. Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961); Stephenson v. Rice Servs., Inc., 323 S.C. 113, 116, 473 S.E.2d 699, 700 (1996) (The ability to perform limited tasks for which no stable job market exists does not prevent an employee from proving total disability). A vocational expert *cannot* determine what the worker's physical restrictions are; that determination is exclusively the province of the medical professionals. In disregarding the medical evidence and making her own unqualified lay opinion of Walker's residual capacity, Westmoreland stepped outside her area of expertise and entered the realm of speculation.

(Ct. App. 2012) (finding based on commissioner's own medical opinion not founded in the medical evidence is not substantial evidence and must be reversed).

Walker's treating physicians (selected by Respondents) restricted her to subsedentary duty. Dr. Math assigned permanent restrictions to Walker of "sedentary work 2.5 hr/day with frequent breaks." [APA 179]. Dr. Math also reviewed the FCE. [APA pages 216-227]. Dr. Math reviewed the FCE and "agree[d] with the permanent physical restrictions provided by the FCE. Ms. Walker most probably cannot perform the full range of sedentary work." [APA page 180]. This is the medical evidence that must necessarily form the foundation for the vocational expert's opinions.

Respondents argue that Westmoreland "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." [Respondents' Return, page 3]. This is simply inaccurate, as *sedentary* is a term of art,³ defined by the Dictionary of Occupational Titles (DOT). Defined physical demand levels are essential for consistency and reliability in disability determination. Vocational experts base their opinions on the DOT classifications.

Westmoreland's report belies her testimony, as Walker's report of her "activities of daily living" confirm how little she is able to do for herself. Westmoreland documented "Ms. Walker will

³The full PDL definitions for sedentary and light duty state:

S-Sedentary Work - Exerting up to 10 pounds of force occasionally (Occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

use a wheel chair if she goes out and has to go for any distance.” [R.p. 736]. Walker can tend to her personal/sanitary needs using a shower chair and grip bars. She cannot clean her house, cut her grass, shop or play sports. She has difficulty with putting on her socks and shoes. She does laundry with assistance from her children. She can drive short distances and ride as a passenger for up to 20 minutes. During the day, she does little more than watch television. Consistent with Westmoreland’s opinion of the activities of a person with a subsedentary capacity, “She naps during the day and the length of time may vary on how she is feeling.” [R.pp. 736-737].

Furthermore, Walker was not able to sit through the entire vocational evaluation. Westmoreland testified that during the one hour and 25 minute evaluation, Walker “took several breaks and walked . . .” [R.p. 776, lines 5-19]. Westmoreland’s report documents that Walker “stood 8 times during the assessment with times standing ranging from 10 seconds to 1 minute.” [R.p. 733]. This is consistent with the hearing before Commissioner McCaskill, where he noted Walker stood “three times during the [two hour and 40 minute] hearing . . .” [R. P. 37, Finding of Fact 30]. And is consistent with the FCE, where the therapist documented “There were several occasions when the evaluatee had to either shift from sitting to standing during a task or shift from standing to sitting.” [R.p. 351]. These multiple occasions confirming her inability to sit only occasionally supports the accuracy of Dr. Math’s restriction of “sedentary work 2.5 hr/day with frequent breaks.” [R. p. 303].

Walker’s disability is more than just the inability to actually perform physical tasks required for sedentary work. Even if she could do the essential functions of a sedentary job, she can only work for 2.5 hours per day. Even attempting more would violate the restrictions from her doctors. Both vocational experts – Westmoreland and Weldon – agreed there are no jobs for someone with these restrictions. To find a job, Walker would have to lie to a prospective employer about her

restrictions. Lying to an employer about work restrictions to get a job is grounds for termination. Indeed, it is even grounds to bar a future workers' compensation claim should she be injured because she exceeded her restrictions. See, e.g., Cooper v. McDevitt & Street Co., 260 S.C. 463, 196 S.E.2d 833 (1973) (employer can void employment relationship when employee makes false statements about his physical condition to induce the employer to hire him).

Walker was employed with Sunbelt for almost 20 years, beginning on June 22, 1992. [R.p. 675]. She was terminated effective March 30, 2012 as “[w]e have no information as to when she will be able to perform the essential functions of her job.” [R. p. 688]. Her condition never improved enough to perform the job at Sunbelt – which apparently was a sedentary job. This fact further confirms that there is no substantial evidence that Walker is capable of being hire to a sedentary job and performing in one.

Respondents also argue that “The FCE and 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 the Appellant’s own admission that she believed she was capable of working at the time she filed her EEOC claim in May of 2013.” [Return, p. 7]. The argument that the restrictions are “inherently unreliable” is just that: argument. Shinn v. Kreul, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct. App. 1993) (noting the argument of counsel is not evidence and, standing alone, provides no support for a finding of fact).

The medical restrictions bear every indicia of reliability. The FCE report states “The results of this evaluation suggest that the evaluatee gave a reliable effort, with 15 of 20 consistency measures within expected limits.” [R.p. 36, Finding of Fact 25; p. 351]. The treating physicians, Drs. Math and Piasecki reviewed and agreed with the FCE and the restrictions. [R. pp. 134, 304, 340-351].

Notably, on February 4, 2013, Dr. Math spoke with the physical therapist specifically about the FCE, confirming that the patient gave “good effort.” [R. p. 308]. There is no evidence to contradict the restrictions from the FCE, Dr. Piasecki and Dr. Math.

In arbitrarily rejecting the overwhelming evidence that Walker functioned at a subsecondary level, the Appellate Panel engaged in a combination of “sit and squirm” jurisprudence and outright speculation – as did Westmoreland when she ventured into making her own quasi-medical determination of Walker’s physical capacity. Rulings of this type have been roundly condemned by the Federal Courts as inherently unreliable. “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).

Walker’s own desire to work and to remain at work at Sunbelt is laudable. It is not evidence that she is able to work. In Hutson, the employee testified that he wanted to own and operate a restaurant, despite having no experience in the foodservice field. The Commission found his testimony was evidence that he was not disabled and denied his claim for lost earnings capacity. The Supreme Court reversed, holding such “rank speculation” was not substantial evidence to support the denial of his claim. The court stated: “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.” Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012). Cf. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992)(claimant’s own misdiagnosis of her injury as a kidney stone was not substantial evidence to support denial of her claim for work-related back injury).

In summary, a vocational expert must rely on medical evidence as a foundation for determining at what level an injured worker can perform – as must the Commission. A vocational expert who disregards medical evidence is speculating when she makes her own lay determination of the employee’s medical condition. As the decision below was based on speculation by both Westmoreland and the Appellate Panel, this Court can and should reverse Walker’s claim for permanent and total disability.

2. The Appellate Panel erred in limiting Walker’s medical treatment to “palliative care” and finding future surgery would not change her MMI status [In Reply to Respondents’ Argument at pages 7-12].

In their Return, Respondents state “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.” [Return, page 12]. This concession – assuming it applies to the seventh surgery awarded by the single commissioner and the Appellate Panel – effectively moots the issue. However, out of an abundance of caution, Appellant hereby replies to the rest of the argument made by Respondents in their Return.

Respondents make two arguments regarding a finding future surgery would not change Walker’s MMI status.⁴

Respondents’ first argument is over Appellant’s attorney’s opening statement: “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]. The obvious point

⁴It may very well be that this argument is mooted by the Court’s holding in the footnote and Respondents’ statement in their Return. However, as a change of condition proceeding on the seventh surgery is pending before the Commission, Appellant seeks both clarity and preservation of the issue so the proceeding below can go forward without risking a denial on *res judicata* grounds.

here is that had Walker prevailed on her claim for permanent and total disability, then there would be no issue over a change of condition based on future surgeries. She would be entitled to lifetime medical treatment. S.C. Code Ann. § 42-15-60 (2007). There is no inconsistency in Appellant's pleading before the Commission. She simply did not prevail on her claim for permanent and total disability.

The fact she was not found to be totally disabled means the Commission must address whether future medical treatment will tend to lessen her period of disability. The dilemma created by the Commission is that she is entitled to only one additional surgery – where there was evidence (cited by Respondents) that she would require multiple surgeries for the rest of her life. [Return, pages 8-9, citing R.p. 809, line 18-p. 810, line 18]. Unless Respondents concede Walker can seek to prove a change of condition when she undergoes the seventh surgery (as the Court appears to hold), then the issue must be clarified and the Commission's decision altered or reversed.

The second argument raised by Respondents is "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." [Return, page 12]. That is really not correct. Appellant's position is that an award of future surgery in a partial disability case cannot preclude that surgery being considered a change of condition – which is the outcome feared by Appellant.

Even with an optimal outcome, the future surgery will render Walker temporarily totally disabled for at least some period of time – which would entitle her to receive temporary total disability. She will no longer be at MMI because her condition has worsened, albeit temporarily. It is also conceivable that the surgery may not be successful, leaving her more impaired and more

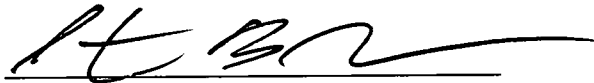
disabled. She should not be barred because of a technicality and/or sloppy drafting in the decision below. Nor should she be limited to only one more surgery, when the evidence shows she will likely need multiple surgeries throughout the rest of her life.

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



Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 2901
(803) 779-4000
stephen@samuelslawfirm.net

Alton L. Martin, Jr.
MARTIN & MARTIN, P.A.
Post Office Box 8220
Greenville, SC 29604
(864) 271-1822
al@MartinsLawFirm.com

ATTORNEYS FOR APPELLANT

Columbia, South Carolina
January 22, 2017

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PROOF OF SERVICE

I certify that I, Katherine Carter, am a paralegal to Stephen B. Samuels and I have caused the **Reply to Respondents' Return to 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 23, 2017, addressed as follows:

L. Brenn Watson, Esquire
Willson Jones Carter & Baxley
872 S. Pleasantburg Drive
Greenville, SC 29607

Page P. Snyder, Esquire
State Accident Fund
PO Box 102100
Columbia SC 29221


Katherine R. Carter

January 23, 2017
Columbia, South Carolina



STEPHEN B. SAMUELS
ANDREW J. BROWN
ATTORNEYS AT LAW

January 23, 2017

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

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JAN 24 2017

SC Court of Appeals

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

Dear Ms. Kitchings:

Enclosed for filing are the original and seven (7) copies of the **Appellant's Reply to Respondents' Return to Appellant's Petition for Rehearing and Proof of Service**, in the above case.

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 **Appellant's Reply to Respondents' Return to Appellant's Petition for Rehearing** as indicated by the enclosed Proof of Service.

Please have your staff clock in the Reply to Respondents' Return to Petition for Rehearing and Proof of Service and return a clocked copy in the enclosed self addressed stamped envelope.

With kindest regards, I am

Sincerely,

A handwritten signature in black ink, appearing to read "Katherine R. Carter". The signature is fluid and cursive, with a large initial "K" and "C".

Katherine R. Carter
Paralegal for Stephen B. Samuels

/krc

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

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