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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Case Number 2016-001154

Matthew Edwards, Employee, ... Appellant,

v.

South Carolina Department of Public Safety, Employer,
and State Accident Fund, Carrier, ... Respondents,

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Whether the Commission erred by denying the Claimant a lump sum where the Commission is required, but failed, to consider whether payment of a lump sum (a) is not contrary to the best interest of the employee and (b) will prevent an undue hardship on the employer or his insurance carrier.

II. Whether the Commission erred in failing to find that Claimant is permanently and totally disabled where (i) the Commission's finding that Claimant was not permanently and totally disabled is unsupported by the evidence as a whole and (ii) the Commission was influenced by the erroneous belief that it would be improper for the Commission to award permanent and total disability where the Claimant was justified in refusing medical treatment.

STATEMENT OF THE CASE

This matter arises from a work-related injury sustained by the Claimant, Matthew Edwards, on July 16, 2012. The Defendants admitted the claim and provided medical treatment which included a right L5-S1 laminectomy, facetectomy, foraminotomy, and discectomy followed by pain management.

The Claimant filed a Form 50, Request for a Hearing, alleging that he was totally and permanently disabled. Defendants filed a Form 51 admitting the back injury, but denying that the Claimant was totally and permanently disabled.

Mandatory mediation was attempted by the parties without resolution. Accordingly, a hearing was held on July 14, 2015. In addition to denying that the Claimant was totally and permanently disabled, the Defendants also objected to a lump sum payment of any award on the grounds that the Claimant's condition might improve.

On November 9, 2015, the Commissioner issued his Order finding that the Claimant was not totally and permanently disabled and awarding a 45% permanent partial disability to the Claimant's back with causally related future medical. The Commissioner also denied a lump sum award to the Claimant on the basis that it would be prejudicial to the Defendants as the Claimant's condition could improve.

The Claimant filed a timely appeal and the case was heard before the Appellate Panel on February 22, 2016. On May 20, 2016, the Appellate Panel affirmed the Order of the Single Commissioner, without making any additional Findings of Fact or Conclusions of Law. This appeal followed.

STATEMENT OF FACTS

The Claimant is a 35 year old man who has worked in law enforcement since approximately 2002; most recently as a transport officer for the Employer since 2007.

The Claimant has a stable work history which began at age eleven (11) working in tobacco fields in the summer and on a Christmas tree farm in the winter. He progressed to golf course maintenance and then obtained his CDL license and drove a truck for different companies. (ROA pp. 73-77). He has a high school education with no other formal training. (ROA p. 80). He did complete basic law enforcement training at the South Carolina Police Academy. (ROA p. 76)

The Claimant was injured on July 16, 2012, while rapidly descending a set of stairs. He felt a pop in his lower back and then pain radiating down his right leg. (ROA p. 80-81). He ultimately had an MRI that showed a free fragment at L5-S1 severely compressing the right S-1 transverse root (ROA p. 326). Surgery was performed by Dr. Michael Bucci on October 1, 2012; however, the Claimant continued to have lower back pain and severe problems with his right leg in the form of numbness and weakness. (ROA p. 273; pp. 88-89). Dr. Bucci referred him to Dr. Eric Loudermilk for pain management (ROA p. 324) and he continues to receive treatment there to the present.

The Claimant did attempt to return to work in January of 2013 on light duty and worked a desk job until light duty expired in July of 2013. (ROA p. 91). Subsequently, the Claimant was deemed disabled by the South Carolina Police Officers Retirement System and retired from the department. (ROA p. 91).

The Claimant continues to receive treatment for pain management and, significant to this appeal, and after much deliberation by the Claimant, has declined to have a spinal

cord stimulator (SCS) implanted in his back for the treatment of neuropathic pain. (ROA p. 118).

LEGAL ANALYSIS AND ARGUMENT

The Commission erred by denying the Claimant a lump sum where the Commission is required, but failed, to consider whether payment of a lump sum (a) is not contrary to the best interest of the employee and (b) will prevent an undue hardship on the employer or his insurance carrier.

The Commission found that the Claimant is not entitled to a lump sum payment of benefits because his "condition may improve in the future, especially if he pursues the recommended SCS; therefore, because there is a greater than usual chance of a change of condition for the better, I find it would be *prejudicial* to the Defendants to grant the Claimant's request for a lump sum." (emphasis the Claimant's) (ROA p. 34 - FOF 48).

S.C. Code Ann. § 42-9-301 governs whether a lump sum payment is made to a Claimant in workers' compensation cases:

"Whenever any weekly payment has been continued for not less than six weeks, the liability therefor may, when the employee so requests and the commission deems it not to be contrary to the best interest of the employee or his dependents, or when it will prevent undue hardship on the employer or his insurance carrier, without prejudicing the interest of the employee or his dependents, be redeemed, in whole or in part, by the payment by the employer of a lump sum which shall be fixed by the commission….."

Breaking the statute down, where the Claimant has requested a lump sum, the Commission in order to award a lump sum, should answer the one following in the affirmative:

(1) Is a lump sum payment not contrary to the best interests of the Claimant?

OR

(2) Will the awarding of a lump sum prevent *(not effect),* an undue hardship on the Employer?

There is no finding by the Commission whether the payment of a lump sum would be contrary to the Claimant's best interests. The Commission may still make a finding that payment of a lump sum would *prevent* the "undue hardship" on the Employer required by the statute. Once again, however, the Commission made no finding. The failure to make at least one of these findings in a determination whether to order a lump sum, is error. (ROA p. 34 - FOF 48)

The Commission did make a finding that the Employer would suffer prejudice. The statute only mentions prejudice to the Claimant, and any finding of prejudice in not applicable to the Employer.

Assuming arguendo that the Commission confused the terms "prejudice" and "undue hardship" and intended that it would *effect* an undue hardship upon the Employer to pay a lump sum, this is still error. The issue is whether the undue hardship on the Employer would be *prevented* by the payment of the lump sum.

Review of a lump-sum award is under the abuse of discretion standard, rather than the substantial evidence standard of review ordinarily employed in reviewing factual findings of the Commission. *Thompson v. S.C. Steel Erectors,* 369 S.C. 606, 612, 632 S.E.2d 874, 878 (Ct.App.2006). "An abuse of discretion occurs if the Commission's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law." *Id.*

Here, the Commission clearly applied the incorrect standard, utilizing a "prejudice" analysis instead of the required "undue hardship" standard. (ROA p. 34 - FOF 48). Further, even if the terms are simply confused or even synonymous, the

Commission found that prejudice would be *effected* rather than *prevented* by the award of a lump sum. Therefore, the Commission failed to make proper findings required to justify denying the Claimant a lump sum and in this error of law, abused its discretion. The Court should remand the issue to the Commission for appropriate findings required to be addressed under the statute.

The Commission erred in failing to find that Claimant is permanently and totally disabled where (i) the Commission's finding that Claimant was not permanently and totally disabled is unsupported by the evidence as a whole and (ii) the Commission was influenced by the erroneous belief that it would be improper for the Commission to award permanent and total disability where the Claimant was justified in refusing medical treatment.

In workers' compensation cases, the Appellate Panel is the ultimate fact finder. *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). The Appellate Panel is reserved the task of assessing the credibility of the witnesses and the weight to be accorded evidence. *Id.* The Appellate Panel is given great discretion to weigh and consider all the evidence, both lay and expert. *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011). Although medical evidence "is entitled to great respect," the Commission is not bound by the opinions of medical experts and may disregard medical evidence in favor of other competent evidence in the record. *Id.* A finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it. *Burnette v. City of Greenville*, 401 S.C. 417, 428, 737 S.E.2d 200, 206 (Ct. App. 2012), reh'g denied (Jan. 25, 2013).

After his back surgery, the Claimant attempted a return to light duty work on January 7, 2013, and he worked a desk job until July of 2013 (ROA pp. 88-91). He testified that he had to drive to the Greenville office and would arrive early so that he could "recover" from the ride. (ROA p. 111, ll. 2-9). He further described how he would get cramps in his leg while driving and have to pull over until it eased up enough for him to continue. (ROA p. 128, ll. 4-13). The Claimant further stated that he would sit for a period of time and then not be able to get up, but that his supervisor was very understanding and would very often send him home early if he saw that the Claimant was in pain. (ROA p. 111, ll. 10-22; p. 128, l. 23 thru p. 129, l. 18). It is highly unlikely that another employer would be so accommodating.

The Claimant testified that he has "a miserable pain" in his right leg constantly. He stated that it hurts to put any weight on it because of shooting pains. (ROA p. 85, ll. 10-25). The Claimant walks with a cane since the surgery and uses it for stability (ROA p. 131, l. 14 thru p. 132, l. 6). He also stated that the pain in his back and leg keep him from sleeping and he often gets cramps in his leg (ROA p. 98, ll. 3-13).

Since his retirement from the department, the Claimant has been a caregiver for his three (3) year old daughter. (ROA pp. 93, 123). He testified that he has difficulty keeping up with her because his right leg lags behind and he feels unbalanced. (ROA p. 93). He also stated that he cannot pick her up (she weighs 30#) and must be seated if he is going to hold her. (ROA p. 123). On the rare occasion he has had to pick her up, he testified that he couldn't do anything for two to three days afterward. (ROA p. 92, l. 20 thru p. 95, l. 13). He indicated that the same thing occurred when he tried to cut wood to

heat his home and that he was "down" for three or four days. (ROA p. 126, l. 17 thru p. 127, l. 6).

The Claimant confirmed that Dr. Loudermilk had prescribed medications for him; however, he testified that they made him edgy and hurt his stomach so he didn't take them. (ROA p. 112, l. 16 thru p. 113, l. 1). He further indicated that in his law enforcement experience, people became addicted to medications and he wanted to avoid that. He also didn't want to be under the influence of medication while caring for his three (3) year old daughter. (ROA p. 113, ll. 8-19). When asked if the medication helped when he did take it, the Claimant stated that it made him so sick that he really didn't know. (ROA p. 113, ll. 20-23). He also testified that currently he only takes Tramadol and uses an analgesic cream on his foot. (ROA p. 127).

Dr. Loudermilk started treating the Claimant in February of 2013 and has administered epidural injections, prescribed several different medications, and prescribed physical therapy; none of which have given the Claimant relief from his pain. (ROA pp. 273-302). In his deposition, Dr. Loudermilk confirmed that the medications he had prescribed caused some side effects such as dizziness and feeling loopy. (ROA p. 240, ll. 18-22). He confirmed that the Claimant has more medication limitations than most, but that he was not malingering. (ROA p. 241, ll. 1-15). In his note of July 18, 2014, Dr. Loudermilk confirms that the Claimant would be "an excellent candidate for stimulator given his medication limitations, but I do not want to push him in that direction. *He will need to make that decision entirely on his own.*" (ROA p. 295). (Emphasis added).

The Claimant had two (2) FCEs. The first one was given on April 23, 2013; six (6) months after his surgery. The FCE consisted of one day of testing and determined

that the Claimant placed in the medium strength category and that he was capable of returning to his job as a police officer as long as he didn't have to do any balancing activities that require crouching and no crawling on hands and feet. (ROA p. 363). Other than mentioning his antalgic gait, this report is void of other limitations.

Nineteen (19) months later, on November 20 and 21, 2014, the Claimant was sent for a second FCE which was a two-day test (ROA pp. 346-359). This report is distinctly different and clearly shows a significant deterioration in the Claimant's ability to perform the tasks. Specifically, the report noted that the Claimant walks with a cane and exhibits external rotation of the right hip combined with right forefoot varus, moderate left forefoot varus, decreased stance time on the right lower extremity, incomplete stride lengths and moderate forward trunk flexion. (ROA p. 346). The evaluator concluded that the Claimant is only capable of work in the sedentary level with "a lifting capacity of 10 lbs. on an occasional basis, 5 lbs. on a frequent basis and he is unable to carry due to significant right lower extremity pain of 9/10 combined with his lack of taxonomy of trying to maintain his balance while toting an object in his hands." (ROA p. 347).

It is common knowledge that FCEs are a snapshot into the ability of someone to work eight hours a day, five days a week; however, the two-day test is a better representation than a one day evaluation. The evidence shows that the Claimant's condition had markedly declined over the nineteen months between the two evaluations and that he would be unable to maintain gainful employment in open competition with others.

The Claimant was also had a vocational evaluation by Robert Brabham, Ph.D., a licensed psychologist, a master in rehabilitation counseling and a certified life care

planner. (ROA pp. 331-345). Dr. Brabham interviewed and tested the Claimant and reported that he had an average range of intelligence and achievement skills, but that he scored a 20 on the *Beck Depression Inventory – II*, which indicated a "Moderate" level of depression. The overall conclusion was that the Claimant would unable to effectively perform the essential duties of his prior work settings or any other gainful employment positions due to his intractable pain, his anxiety and depression, and the fact that he has to spend four (4) hours per day "resting or reclining". Dr. Brabham stated that all of his opinions were offered within a reasonable degree of professional certainty, based upon more than 50 years of vocational rehabilitation and psychology experience. (ROA p. 343).

In response, the Defendants sent the Claimant to James Myers, MA, QRP, CCM, CRC with Corvel for another vocational opinion. (ROA pp. 383-399). Mr. Myers also interviewed and tested the Claimant and the results were similar to those determined by Dr. Brabham. However, Myers opined that the Claimant could return to sedentary work or light work and would have no trouble finding a position. According to his report, light work is defined as exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly to move objects. (ROA p. 390). This contradicts the most recent FCE which limits the Claimant to sedentary duty, places his lifting restrictions much lower and restricts him from carrying anything. (ROA p. 347).

In his Labor Market Survey, Myers listed twelve (12) employers that "indicated they were hiring or would be hiring in the near future." (ROA p. 394). However, the Claimant testified that he had contacted everyone on Myers' list. He stated:

A. Well, one of them I call – well, several of the numbers on there that – that he give me was disconnected. And then I called one place it was – was AP Security Services and he told me – he told me that he did have security jobs open....

...I have to have a cane. And he said its twelve (12) hours on your feet all day long. And he says, this job ain't for you, and that was just what he left it at. The other places that he had listed I called and they said they'd never heard of the jobs. One place, Scan Source, they told me that all their positions was listed on their web site. So, I go on their web site and you've got to have a degree, a college degree, to – to apply for them and I don't – I don't have that. I'm just, you know, I'm not credited enough with all that college degree stuff, so. (ROA p. 117, l. 15 thru p. 118, l. 8).

In his deposition, Mr. Myers testified that he used the Occupational Network online to input the Claimant's information and that it tells him that he has to look in a sedentary and light capacity and these are the jobs that would fit that capacity. "And a person with his skills should be able to do these jobs." "That's all it tells me. Now, him personally, I can't say yes, he can do these jobs." (ROA p. 175, l. 7 thru p. 176, l. 11). However, when each job was reviewed individually, there were variables that Myers did not know and assumptions he made about the Claimant's transferrable skills that were not verified. (ROA p. 179, ll. 1-7; pp. 180-210) and then based his opinion on what the Occupational Network told him. Myers stated that a person with the Claimant's transferable skills should fit into these positions, but admitted that not necessarily the Claimant himself. (ROA p. 179, ll. 8-20). He could not say whether or not the Claimant had the requisite skills for any of them. (ROA pp. 180-210). In fact, Myers testified that the Occupational Network system is put out through the Department of Labor and stated

that, "if they are wrong, they are wrong," but it is what all vocational experts have to follow. (ROA p. 184, ll. 20-25).

Myers report and his opinions are inconsistent and the Commission erred by relying on his opinion to find that the Claimant is not totally and permanently disabled.

The Commission also erred by allowing its findings of fact regarding the extent of the claimants disability to be influenced by the Claimant's refusal to allow placement of a spinal cord stimulator.

The Commission found that "it would be improper to award permanent and total disability benefits in the present case given [the treating pain management physician's] testimony that the Claimant is "an ideal candidate" for a [spinal cord stimulator] and the fact that a [spinal cord stimulator] would likely improve his condition and lessen his disability." (ROA pp. 43-33 - FOF 49).

Nowhere in the statutory law or the regulations is there support for the Commission penalizing the Claimant for a *reasonable* refusal of medical treatment. There is support for barring further compensation to the claimant who unjustifiably refuses to accept medical treatment. S.C. Code Ann. § 42-15-60 (2007) states, in pertinent part, "The refusal of an employee to accept any medical, hospital, surgical, or other treatment or evaluation when provided by the employer or ordered by the commission bars the employee from further compensation until the refusal ceases and compensation is not paid for the period of refusal unless in the opinion of the commission the circumstances justified the refusal."

However, here, the Commission did not make a finding under S.C. Code Ann. § 42-15-60 as to whether the Claimant was unjustified in his refusal. Neither did the

Employer even contend that the Claimant's refusal should bar the Claimant from further benefits. Barring of benefits due to refusal of the spinal cord stimulator of the spinal cord stimulator was not at issue in the case.

Given that the Commission relates that he feels he cannot award permanent and total disability due to the refusal, and thereafter awards 45% disability to the Claimant's back (ROA pp. 43-44 - FOF 47, 49), there is clear prejudice to the Claimant and that the Commission's finding is erroneously reached. In this circumstance, there is no authority for the Commission to have reached such conclusion while penalizing the Claimant for his refusal.

Workers' compensation is a creature of statute. *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 581 S.E.2d 836 (2003). An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose. *Bazzle v. Huff*, 319 S.C. 443, 462 S.E.2d 273 (1995).

The Court of Appeals has the authority to reverse the Commission's finding.

S.C. Code Ann. § 1-23-380. Judicial review upon exhaustion of administrative remedies.

> The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;...

In *Brown v. Bi-Lo, Inc.*, *supra*, the Claimant sought to prevent the Employer's representatives from speaking to the Claimant's health care providers *ex parte*. The Court found that applicable workers compensation law only allowed for disclosure by health care providers of existing written records and documentary materials and denied the Employer the right to an *ex parte* communication, noting that we are bound to strictly construe the terms of the statute and to rely on the General Assembly to amend the statute where necessary. *Brown v. Bi-Lo*, 838.

In *Bazzle v. Huff*, *supra*, Bazzle's counsel was ordered by the Worker's Compensation Commission to return attorneys fees to the Claimant because the fees were not submitted for approval to the Worker's Compensation Commission. The Court found that the Worker's Compensation Commission did not have the authority of the General Assembly to require approval of attorney's fees until after the relevant time period during which the attorney's fees in Bazzle were paid. "An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose." *Bazzle,* at 274.

Likewise here, the Commission fashioned a remedy not authorized by the legislature by erroneously allowing his factual conclusion regarding the extent of disability in the case to be influenced by the Claimant's lawful and proper refusal of a spinal cord stimulator.

CONCLUSION

It is respectfully submitted that the Single Commission erred by refusing to order a lump sum of the Claimant's award after failing to find either that a lump sum was not in

the best interests of the Claimant or alternatively that the payment of a lump sum would *prevent* "undue hardship" on the Employer.

In addition, the Commission erred in denying the Claimant permanent and total disability where the evidence does not support the Single Commission's findings that the Claimant is not totally and permanently disabled and by the Commission allowing the erroneous belief that it would be improper for the Commission to award permanent and total disability where the Claimant was justified in refusing medical treatment to influence its factual determination regarding the extent of disability.

Accordingly, the Claimant submits that the Order of Single Commission should be reversed and that the Claimant should be awarded workers' compensation benefits for total and permanent disability for his injuries, medical care and other benefits.

Respectfully submitted,

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