

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Op. No. 2016-UP-529 (S.C.Ct.App. filed December 21, 2016)

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S.C. SUPREME COURT

Kimberly Walker, Petitioner,

v.

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

PETITION FOR WRIT OF CERTIORARI

Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(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 PETITIONER

OTHER COUNSEL OF RECORD:
L. Brenn Watson
WILLSON JONES CARTER & BAXLEY, PA
872 S. Pleasantburg Drive
Greenville, SC 29607
(803) 227-2889
lbwatson@wjlaw.net
ATTORNEYS FOR RESPONDENT

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on February 24, 2017.

QUESTIONS PRESENTED

1. Whether the Workers' Compensation Commission erred in holding Kimberly Walker is not 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?
2. Whether the Workers' Compensation Commission engaged in inherently speculative "sit and squirm" jurisprudence when it arbitrarily rejected the overwhelming medical and vocational evidence of total disability, thus reaching an arbitrary and unsustainable decision based on rank speculation?
3. Whether the Court of Appeals erred in affirming the Commission's ruling that Walker's medical treatment to "palliative care" and finding future surgery would not change her MMI status?

STATEMENT OF THE CASE

This is an appeal from the Workers' Compensation Commission. Petitioner Kimberly Walker was employed with Respondent, Sunbelt Human Advancement, for 20 years – until her employer terminated her on March 30, 2012 because it could not accommodate the work restrictions from her February 19, 2009 work injury. [R. p. 796, lines 1 -15].

After undergoing 6 surgical procedures for her left knee and receiving ongoing pain management for her knees and back, Walker was given permanent restrictions by her treating doctors of "sedentary work 2.5 hr/day with frequent breaks." [R. p. 303]. The restrictions were based on a Functional Capacity Evaluation in which Walker "gave a reliable effort, with 15 of 20 consistency measures within expected limits." The examining physical therapist concluded: "The evaluatee does

not even meet the criteria for even sedentary work. This means that her overall classification at this time is below Sedentary. [R. p. 351].

Petitioner's vocational expert, Rock Weldon, opined "She should be considered permanently and totally disabled." [R. pp. 127 - 133]. Upon further review of updated records from Drs. Sanchez, Tollison, Math and Piasecki – all whom were treating physicians, he stated: "After review of the additional documents as outlined above, I continue to believe that Ms. Walker is unable to perform work at any exertion or skill level and should be considered permanently and totally disabled. [R. pp. 125 - 126].

Respondents' vocational expert, Jan Westmoreland, opined in her written report that work was available in the open market for Walker. However, in her deposition, 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 (emphasis added)].

The case was tried on March 12, 2014, before Commissioner Gene McCaskill. In a Decision and Order dated July 23, 2014, the Single Commissioner denied Petitioner's claim for permanent and total disability, instead awarding 40% permanent partial disability to her left knee; 2% to her back and 0% to her right knee.

The Appellate Panel affirmed, adopting the Single Commissioner's findings of fact essentially verbatim. Three specific findings of fact form the core of this appeal:

63. When we consider the record as whole, reviewing Claimant's responses and comments throughout the record and in her testimony at the hearing, we find her subjective complaints to be inconsistent with the medical evidence and her actions at the hearing as observed by the Single Commissioner. As such, we find that Claimant is not credible.
64. With such a finding, given that many of the medical opinions are dependent on the subjective complaints of Claimant, those conclusions must be viewed in a questionable light as well. That being said, the empirical medical evidence stands on its own.
67. 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].

Petitioner appealed these particular finding to the Court of Appeals, along with the finding that a planned seventh knee surgery would not change Walker's MMI status, thus effectively barring her from filing for a change of condition when she undergoes the knee surgery.

The Court of Appeals affirmed the Appellate Panel in an unpublished decision issued on December 21, 2016. Walker v. Sunbelt Human Advancement, Op. No. 2016-UP-529 (S.C. Ct.App. filed December 21, 2016). After denial of the Petition for Rehearing, Walker filed this Petition for Writ of Certiorari.

This case raises important and novel issues regarding the fact finding methodology used by the Workers' Compensation Commission, specifically the disregard of positive evidence in favor of speculation founded on unreliable lay observations by the commissioners.

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].

Petitioner 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.”).

A. There is no substantial evidence to support the Appellate Panel's findings that Walker is not permanently and totally disabled.

The Court of Appeals 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 Petitioner’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*. A personal opinion from an expert has no probative value because it has no basis in the evidence – it is no more than a hunch. Conversely, an expert opinion must be 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 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 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 dispositive proof of Walker's total disability lies in Westmoreland's *expert* opinion (based on the medical evidence) that there are no jobs available for someone with Walker's restrictions. [R. p. 752, line 14 - p. 753, line 4]. Coupled with Rock Weldon's similar opinion, there is simply no way for the Commission to find otherwise based on the medical and vocational evidence in the record.

B. The Appellate Panel must be reversed because the decision below is based on inherently unreliable “sit and squirm” jurisprudence.

The Appellate Panel 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).

Petitioner is aware that the Appellate Panel is the ultimate judge of credibility. And indeed, a determination of the credibility of witnesses is critical to fact finding when there is a conflict in the testimony. However, when the Panel makes an unfavorable credibility finding to create a tool for putting medical evidence in a “questionable light,” then it has ventured deep into the speculative

world of sit and squirm jurisprudence. Use of such an arbitrary and unreliable methodology 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).

Petitioner respectfully requests the Court issue the writ, 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 of Appeals 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 treatment 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.” Walker v. Sunbelt Human Advancement, Op. No. 2016-UP-529 (S.C. Ct.App. filed December 21, 2016)

Petitioner respectfully suggests this ruling is inherently contradictory. Assuming, as the Commission found, that Walker is not permanently and totally disabled, then it must mean 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).

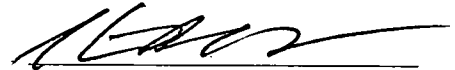
Furthermore, Walker is doubly prejudiced by the Commission’s preclusion of her future knee surgery to be addressed as a change of condition. The Commission is prohibited from basing a partial disability award on a potential need for surgery. See Sanders v. Meadwestvaco Corp., 371 S.C. 284, 638 S.E.2d 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, this Court should grant the Petition for Writ of Certiorari and permit further briefing of the issues.

Respectfully Submitted



Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(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
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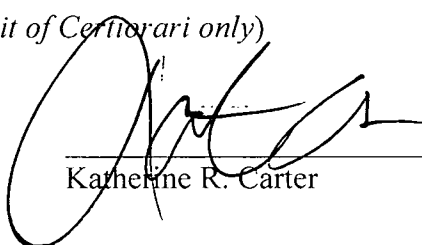
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PROOF OF SERVICE

I certify that I am paralegal to Stephen B. Samuels and I have caused a copy of the **Petition for a Writ of Certiorari** and **Appendix** to be served by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on March 27, 2017, addressed as follows:

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

Honorable Jenny Abbott Kitchings
Clerk of Court, SC Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211
(Petition for a Writ of Certiorari only)



Katherine R. Carter

March 27, 2017
Columbia, South Carolina