THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2017-000730

Kimberly Walker, Employee, ... Petitioner,

v.

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

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner sustained a compensable injury to her left knee in a work-related accident on February 19, 2009. Thereafter, she developed admitted overcompensation injuries to her right knee and low back. By Order of the Workers' Compensation Commission, dated February 14, 2013, Petitioner was also found to have suffered an aggravation of her preexisting psychological condition due to the 2009 accident and associated injuries. Petitioner filed a Form 50, Request for Hearing, on August 26, 2013, and a hearing was held before the Single Commissioner on March 12, 2014.

At the hearing, it was Petitioner's position that she had reached maximum medical improvement (MMI) for the conditions related to the 2009 accident, and she alleged she is permanently and totally disabled on account of the same, pursuant to S.C. Code Ann. Section 42-9-10. Petitioner argued that, despite being at MMI, she was entitled to future medical treatment, to include a seventh left knee surgery recommended by the authorized treating physician. ***Petitioner argued the surgery would not affect her MMI status, and she submitted a questionnaire from the authorized treating surgeon supporting that argument.***

Respondents set forth alternative positions: (1) Petitioner had either reached MMI, was not permanently and totally disabled, and was not entitled to further knee surgery; or, (2) Petitioner had not reached MMI and was entitled to further knee surgery as recommend by the authorized treating physician.

By Decision and Order dated July 23, 2014, the Single Commissioner adopted Petitioner's position that she had reached MMI. The Single Commissioner assigned 40% permanent partial disability to Petitioner's left knee, 2% permanent partial disability to her

low back, and 0% permanent partial disability to her right knee. The Single Commissioner found Petitioner's psychological condition is not disabling. The Single Commissioner found Petitioner is entitled to causally-related future medical treatment, and Respondents are entitled to a credit for overpayment of TTD paid beyond December 13, 2013. ***The Single Commissioner further found that Petitioner is not credible***. On July 28, 2014, Petitioner filed a Form 30, Request for Commission Review, appealing the Order of the Single Commissioner to the Appellate Panel of the South Carolina Workers' Compensation Commission (hereafter, "the Appellate Panel"). Petitioner unequivocally argued at the Single Commissioner hearing that she had reached MMI, despite her need for another left knee surgery. However, Petitioner's Form 30 indicated the Commission erred by finding Petitioner had reached MMI.

Briefs were filed by the parties, and oral arguments were held before the Appellate Panel on November 18, 2014. By Decision and Order dated March 4, 2015, the Appellate Panel affirmed the Order of the Single Commissioner in its entirety. Petitioner timely filed a Notice of Appeal to the South Carolina Court of Appeals and, on December 21, 2016, the Court of Appeals 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). Petitioner filed a Petition for Rehearing with the Court of Appeals on January 5, 2017, asserting that the Court overlooked or misapprehended issues in affirming (1) the Commission's finding that Petitioner is not permanently and totally disabled, and (2) the Commission's limiting Petitioner's future treatment and finding that a future surgery would not change Petitioner's

MMI status. By Order dated February 24, 2017, the Court of Appeals denied Petitioner's Petition for Rehearing.

On March 27, 2017, Petitioner filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, and Respondents respectfully submit this Return to the Petition for Writ of Certiorari.

ARGUMENTS

I.

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

Petitioner incorrectly asserts that there is no conflict in the evidence pertaining to Petitioner's employability, arguing that both vocational experts in the claim opined that Petitioner is permanently and totally disabled. The key issue surrounding Petitioner's argument 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 Petitioner's doctors in arriving at her final vocational opinion. Petitioner cites no authority to support the specific argument that an expert vocational opinion *must* be limited to the work restrictions assigned by a medical provider. Without any such authority, Jan Westmoreland's expert vocational opinion 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 Petitioner 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 Petitioner's Counsel during the 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 Petitioner. *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 professional 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 Petitioner'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 Petitioner is capable of sedentary work based on her opinion as a vocational expert. (R. p. 749, lines 15-18)

Petitioner insists that, because there is an FCE in the record which indicates capabilities of sub-sedentary activities[1], it is simply not possible for a vocational expert to find a claimant capable of more. On the contrary, Ms. Westmoreland testified that, when she completed her vocational report, she was operating under the assumption that the sub-sedentary classification assigned by the October 2012 FCE represented ***a floor*** for Petitioner'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

[1] As pointed out below, this FCE was obtained at the referral of Petitioner's attorney, it was performed *prior* to Petitioner reaching MMI, and it was specifically noted by the therapist that Petitioner could be capable of more if she underwent work hardening. The FCE is inherently unreliable.

considers a patient's age in evaluating vocational abilities, and Petitioner was forty-five (45) years old at the time of her vocational evaluation; an age that is not an impediment to Petitioner returning to work. (R. p. 762, lines 19-24) As another example of factors used in assessing Petitioner's vocational abilities, Ms. Westmoreland testified that Petitioner 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 doctor or FCE. (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 Petitioner can perform the jobs listed in her vocational report, as Petitioner 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 Petitioner remains employable ***to a reasonable degree of vocational certainty***. (R. p. 774, line 12 – p. 775, line 2)

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

opinion is not based solely on restrictions assigned by a patient's doctors.[2] 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 Petitioner's age, work experience, intellect, functioning, and her interactions with Petitioner. Petitioner 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.

The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Shealy v. Aiken Cty., 341 S.C. 448, 535 S.E.2d 438 (2000); Parsons v. Georgetown Steel, 318 S.C. 63, 456 S.E.2d 366 (1995). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999). Where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive. Etheredge v. Monsanto Co., 349 S.C. at 455, 562 S.E.2d at 681 (Ct.App.2002). The Commission determines the weight to be accorded evidence and, in light of the totality of the evidence in this claim, the Appellate Panel relied on the opinion of Jan Westmoreland. This opinion, alone, represents substantial evidence to support the Appellate Panel's finding that Petitioner 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, and substantial evidence supports the Appellate

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[2] Petitioner notes that the evidentiary foundation for a vocational expert's opinion "...is largely found in the medical evidence," implicitly acknowledging that medical evidence is not the sole basis for a vocational expert's opinion. (Petition for Writ of Certiorari, p. 7)

Panel's conclusions. "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 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 appellate Courts may not substitute their 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 Appellate Panel found that Petitioner is not credible. In light of Petitioner's lack of credibility and numerous inconsistencies outlined by the Appellate Panel, the Appellate Panel found that the FCE and restrictions assigned by the doctors were questionable, as they were based largely on Petitioner's subjective complaints and actions. Respondents asserted at the Commission level, and continue to assert today, that Petitioner's lack of credibility is the most important aspect of this claim. When 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.

Petitioner has a high school diploma, a bachelor's degree, and a master's degree, and the Appellate Panel specifically noted that Petitioner'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 Petitioner 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

Petitioner'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 Petitioner is not permanently and totally disabled, and substantial evidence supports the Appellate Panel's Decision and Order.

II.

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

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

1. Petitioner'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. Petitioner'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. Petitioner'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...[Petitioner] seeks an award of Permanent and Total Disability." (R. p. 123)

4. Petitioner's Pre-hearing brief further stated: "The authorized knee surgeon has recommended another arthroscopic procedure. ***However, it is that same doctor's opinion that [Petitioner] remains at MMI. [Petitioner] 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 Petitioner'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, Petitioner 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, Petitioner'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 Petitioner remained at MMI, despite the ongoing surgical recommendation.

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

In support of her current argument, Petitioner 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 Petitioner is no longer entitled to *temporary* disability benefits after she has reached MMI. After MMI, Petitioner 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 Petitioner'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.

Petitioner 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 Petitioner 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:

> [Petitioner] 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 [Petitioner] 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)

> [Petitioner] 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 Petitioner had reached MMI, the Appellate Panel appropriately found no basis for inclusion of any additional invasive procedures in Petitioner'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.

Petitioner's final argument is that she is prejudiced because her future knee surgery cannot be addressed as a change of condition claim. Petitioner cites no authority for this argument; likely because no such authority exists. If Petitioner 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 the Court of Appeals in the December 21, 2016, Opinion, "...the Commission's Order does not preclude [Petitioner] 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 Petitioner'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 Petitioner'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 Petitioner from pursuing a change of condition claim.

CONCLUSION

For the reasons stated above, Respondents respectfully request an Order denying the Petition for Writ of Certiorari.

Respectfully submitted,

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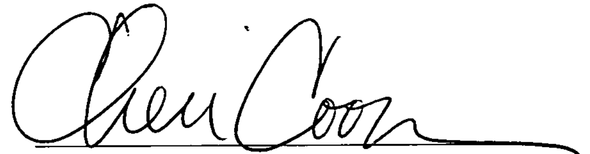
PROOF OF SERVICE

I, Cheri Evans Coon, certify that I have served the **Respondents' Return to Petition for Writ of Certiorari** on April 26, 2017, by depositing a copy of it in the United States Mail, postage prepaid, on April 26, 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 April 26, 2017, addressed to Daniel E. Shearouse, Clerk of Court, The Supreme Court of South Carolina, Post Office Box 11330, Columbia, South Carolina, 29211.

April 26, 2017



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