

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission S.C. SUPREME COURT

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

Kimberly Walker, Petitioner,

v.

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

**PETITIONER'S REPLY TO
RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI**

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Argument 1

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. 6

 A. There is no substantial evidence to support the Appellate Panel's findings that Walker is not permanently and totally disabled. 6

 B. The Appellate Panel must be reversed because the decision below is based on inherently unreliable "sit and squirm" jurisprudence. 8

2. The Appellate Panel erred in limiting Walker's medical treatment to "palliative care" and finding future surgery would not change her MMI status. 10

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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' Return at Pages 5-11].**

Respondents' Return inadvertently demonstrates the importance of this case and persuasively argues for the Writ of Certiorari to be issued. The Commission's decisions *must* be based on reliable evidence. The Court cannot permit the Commission to give any credence to an expert witness who will say anything – no matter how preposterous, speculative or made up – so long as it is favorable to the party who retained her. Allowing “expert” opinions lacking a foundation in the evidence to carry the day – as occurred here – will encourage litigants to shop for experts based on the malleability of their opinions. It turns the fact-finding mission of the Commission into a child's guessing game rather than an unbiased search for the truth.

The issue here is not one of weighing contradicting competent evidence. The issue here concerns the lack of a foundation in the evidence for the opinion given by an expert and relied on by the Commission, as well as the Commission's own disregard of medical evidence and use of “sit and squirm” jurisprudence.

Respondents begin their argument with a discussion of the opinions rendered by their vocational expert, Jan Westmoreland. Respondents argue: “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.” [Return, page 5]. Respondents misstate Petitioner's argument. A vocational expert should include other vocational factors such as age, education, training, and transferable skills as part of the analysis. However, work restrictions and residual physical capacity

resulting from the injury are the *sine qua non* of every vocational analysis. If Walker's injury had not restricted her ability to work, there would be no need for vocational experts because she would not be disabled under the economic model. A vocational expert who blithely disregards established medical work restrictions is resorting to rank speculation. See Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012) ("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."). Cf. Watson v. Xtra Mile Driver Training, Inc., 399 S.C. 455, 732 S.E.2d 190 (Ct. App. 2012) ("the very existence of these restrictions [of sitting no more than three minutes and standing no more than twelve minutes] beg the question of whether they so limit the quality, dependability, or quantity of the services Watson is able to perform that there exists no stable job market for those services.")(Geathers, J, dissenting), *overruled by* Clemmons v. Lowe's Home Centers, Inc., Op. No. 27708 (S.C. Sup. Ct. filed March 8, 2017) (Shearouse Adv. Sh. No. 10 at 33).

As to the argument "Petitioner cites no authority," Petitioner cited Young v. Tide Craft, 270 S.C. 453, 468, 242 S.E.2d 671, 678 (1978), for the well-established proposition that "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." When Westmoreland applied a factual basis (the restrictions assigned by the FCE and the treating physicians), she expressly opined there were *no jobs* available for Ms. Walker. [App. p. 802, line 24-p. 803, line 4]. Conversely, when Respondents' counsel asked her to remove the essential foundation from her vocational opinion, Westmoreland gave the opposite opinion. This is not a mere inconsistency in the testimony; this is an expert who gives an accurate opinion when pinned down on cross-examination, yet gives a diametrically contrary opinion when

asked to disregard the medical work restrictions. Removing critical evidence from the question renders the resulting opinion incompetent. See Brown v. La France Industries, 333 S.E.2d 348, 286 S.C. 319 (Ct. App. 1985)(facts in hypothetical presented to expert witness must have a foundation in the evidence).

Respondents also mischaracterize Westmoreland's testimony. Respondents argue "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." [Return, pages 5-6 (emphasis added). Westmoreland was asked nothing of the sort – Petitioners add words that were not part of the question nor part of the answer. When asked "what jobs are available in the national or local economy with someone with the restrictions provided to her by the functional capacity evaluation, Dr. Math, her authorized back doctor, and Dr. Piasecki, her authorized knee doctor," Westmoreland responded: "With that in consideration, there would be none at this time." [App. Page 802, lines 14-21]. Westmoreland's testimony shows *she did not consider the work restrictions* in formulating her initial opinion. Such a fundamental flaw in methodology leaves Westmoreland's opinion fatally incompetent and utterly bereft of probative value. See Michau v. Georgetown County, 396 S.C. 589, 723 S.E.2d 805 (2012)(reversing Commission's finding based on incompetent expert opinion).

Respondents also put great effort into attempting to discredit the FCE.¹ Respondents

¹Respondents make the completely illogical argument – based on Westmoreland's testimony – that "the sub-sedentary classification assigned by the October 2012 FCE represented *a floor* for Petitioner's capabilities, *not a ceiling*." [Return, p. 6 (emphasis in original). Cf. Lail v. South Carolina State Highway Department, 244 S.C. 237, 136 S.E.2d 306 (1964)(testimony relied upon by the plaintiff to establish liability was inconsistent with

overlook the fact that both treating doctors, Dr. Piasecki and Dr. Math, opined the FCE was a valid measure of Walker's physical restrictions. When Dr. Math placed Walker at maximum medical improvement on March 4, 2013, she assigned permanent restrictions to Walker of "sedentary work 2.5 hr/day with frequent breaks." [R. p. 303, lines 12-13]. On January 13, 2014, Dr. Piasecki also confirmed that ". . . the restrictions provided in that FCE . . . [m]ost probably remain an accurate description of Ms. Walker's physical limitations." [R. p. 134, lines 16-18]. There was no basis for disregarding this medical evidence. 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 their conclusion).

The Commission's decision in this case is unsupported by substantial evidence. The medical restrictions combined with the opinions of the vocational experts (including Westmoreland's when she applied the medical restrictions to her analysis) show that there is no evidence on which a reasonable trier of fact could find Walker is not permanently and totally disabled.

Petitioner requests the Court grant the Petition for Writ of Certiorari. This case presents important issues about the use of expert testimony in workers' compensation cases, as well as the Commission's descent into speculation by its use of unreliable and discredited "sit and squirm" jurisprudence. An outcome and methodology so flawed – and so capable of repetition if not corrected – should be addressed by our State's highest court.

incontrovertible physical facts and therefore lacked probative value).

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' Return at Pages 12-17.]

Respondents primary argument obfuscates the central issue regarding future medical treatment and its impact on disability. Respondents seem confused by Walker's pleading in the alternative.

At the single commissioner hearing, Petitioner 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. [App. P. 842, lines 19-22]. Respondents replied, "it is our position that she has not reached maximum medical improvement by Dr. Piasecki, pursuant to the Claimant's own desire has issued an opinion that he would like to perform a seventh surgery." [App. P. 843, lines 6-10]. The single commissioner rejected both arguments, finding Walker at MMI; not totally disabled; and awarding the seventh knee surgery as "palliative treatment."

On appeal to the Appellate Panel, Petitioner argued alternative positions – the essence of which was that either she is at MMI and permanently and totally disabled (her position at the hearing), or "If Claimant needs surgery and is not Permanently and Totally disabled, then she is not at MMI (Respondents' position at the hearing). There is no error in taking this alternative posture before the Appellate Panel when these were the same positions taken by the parties at the hearing.

Respondents include other straw man arguments, to wit: "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 clear absurd result." [Return, pages 14-15]. And "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 the accident.

[Return, page 16].

Petitioner's position throughout this appeal has been simple and straightforward. If she is not permanently and totally disabled, but is at MMI with permanent partial disability, then when she actually undergoes the seventh knee surgery, she should be able at that time to prove she has suffered a change of condition for the worse.

The issue concerns the finding by the Appellate Panel that "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]. As those future medicals include the seventh knee surgery, Petitioner is concerned that the finding will preclude her from proving a change of condition when she has the seventh surgery.

This kind of preemptive strike violates the well-established procedure for a change of condition. "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). Thus, while Walker needed the surgery at the time of the original hearing, the surgery itself will change her physical condition. As she will be completely disabled, albeit temporarily, following the operation, she should not be barred from receiving temporary compensation under a change of condition. Moreover, if the surgery is not successful, she will have suffered a permanent change of condition for the worse.

Another thorny problem created by the Appellate Panel's finding is the preclusion of other invasive procedures in her future medical treatment. If, as is quite possible, she ultimately requires a knee replacement or some other additional surgery, she cannot receive such a surgery because it

is excluded by the finding and she is barred from filing a change of condition.

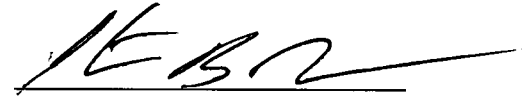
Respondents claim “Petitioner cites no authority for this argument; likely because no such authority exists.” [Return, page 16]. It is true that no direct authority exists for the exact problem created by the Appellate Panel in this case.² The novelty of the issue is precisely why the Writ should be issued.

²There is a body of case law finding change of condition claims barred by res judicata. See, e.g., Mead v. Jessex, Inc., 676 S.E.2d 722, 382 S.C. 525 (Ct. App. 2009)(Change of condition claim “The doctrine of res judicata barred this second attempt at a claim for the left hip and left leg symptoms which were initially found not to be compensable.”); Owenby v. Owens Corning Fiberglas, 313 S.C. 181, 437 S.E.2d 130 (Ct. App.1993)(change of condition for psychological claim barred by res judicata because commission had previously ruled psychological condition was not causally related to physical injury).

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari and permit further briefing of the issues.

Respectfully Submitted



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In The Supreme Court

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Appellate Case No. 2017-000730

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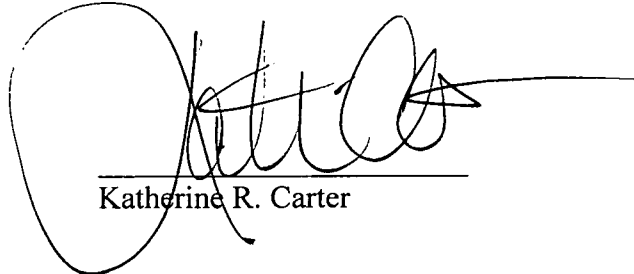
v.

Sunbelt Human Advancement, Employer, and
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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 **Reply to Return to Petition for a Writ of Certiorari** 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 May 8, 2017, addressed as follows:

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Katherine R. Carter

May 8, 2017
Columbia, South Carolina