

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1417078
Appellate Case No. 2017-001106

RECEIVED
NOV 27 2017
SC Court of Appeals

Nathan Buchanan, Employee, Claimant Respondent,

v.

City of Hanahan, Employer,
and State Accident Fund, Carrier, Appellants.

BRIEF OF RESPONDENT

Matthew W. Jackson # 69956
JOYE LAW FIRM
5861 Rivers Avenue
North Charleston, SC 29406
(843) 554-3100
(843) 725-2343 (facsimile)
mjackson@joyelawfirm.com

Blake A. Hewitt # 73674
BLUESTEIN THOMPSON SULLIVAN
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
blake@bluesteinattorneys.com

Attorneys for Respondent

TABLE OF CONTENTS

Table of Authorities	ii
Counter-Statement of Issues on Appeal	1
I. Whether the Workers' Compensation Commission abused its discretion when it left the evidentiary record "open" so the commission could receive a medical report that was not available when this claim's hearing began.	
II. Whether the commission's finding that Nathan Buchanan's knee injury affects his back is clearly erroneous.	
Statement of the Case	1
Arguments	3
I. The commission did not abuse its discretion when it left the evidentiary record open so the commission could receive a medical report that was not available when this claim's hearing began	4
a. The commission's regulations give the commission the discretion to use flexible procedures in an effort to receive all relevant evidence	4
b. Multiple precedents confirm the commission's discretion to use flexible evidentiary procedures	5
II. The commission's finding that Mr. Buchanan's knee injury affects his back is supported by the evidence and is not clearly erroneous	7
Conclusion	9

TABLE OF AUTHORITIES

Fore v. Griffco,
409 S.C. 360, 762 S.E.2d 37 (Ct. App. 2014) 6

Hallums v. Michelin,
308 S.C. 498, 419 S.E.2d 235 (Ct. App. 1992) 6

Hartzell v. Palmetto Collision,
415 S.C. 617, 785 S.E.2d 194 (2016) 8

Holcombe v. Dan River Mills,
286 S.C. 223, 333 S.E.2d 338 (Ct. App. 1985) 6

Lark v. Bi-Lo,
276 S.C. 130, 276 S.E.2d 304 (1981) 7

Morgan v. JPS Automotives,
321 S.C. 201, 467 S.E.2d 457 (Ct. App. 1996) 6, 7

Trotter v. Trane Coil Facility,
393 S.C. 637, 714 S.E.2d 289 (2011) 5, 6

Statutes and Other Authorities

S.C. Code Ann. § 1-23-380 (Supp. 2017) 7

S.C. Code Ann. Regs. 67-612 (2012) 4

S.C. Code Ann. Regs. 67-613 (2012) 5

COUNTER-STATEMENT OF ISSUES ON APPEAL

- I. Whether the Workers' Compensation Commission abused its discretion when it left the evidentiary record "open" so the commission could receive a medical report that was not available when this claim's hearing began.
- II. Whether the commission's finding that Nathan Buchanan's knee injury affects his back is clearly erroneous.

STATEMENT OF THE CASE

This case involves the Workers' Compensation Commission's power to employ flexible hearing procedures to receive all relevant evidence. Following the hearing in this case, the commission exercised its discretion to leave the record "open" in order to receive in evidence a medical record that was not available when the hearing began. Appellants are the employer and its insurance carrier. They contend this was erroneous.

Nathan Buchanan worked for the Hanahan Fire Department for over 30 years, ultimately rising to the rank of Captain. (R.p.22, lines 12-17). He injured his left knee on August 9, 2014 when he slipped and fell. (R.p.24, line 19 - p.26, line 9).

This injury cost Mr. Buchanan his job. He had surgery in January of 2015 and he has needed the assistance of crutches or a cane since the date of the injury. (R.p.68) (surgery record); (R.p.40, line 1-18). Medical records from the months following surgery consistently note Mr. Buchanan's problems with swelling and grinding in his knee as well as pain radiating down his leg. (R.pp.73, 78, 82). His permanent restriction against climbing precluded him from returning to his job as a firefighter. (R.p.84).

The case came before the commission at Appellants' request. In August of 2015 the doctor treating Mr. Buchanan's knee determined the knee had reached the point of maximum

medical improvement and gave the knee a 15% permanent impairment rating. (R.p.84). Four months later, in January of 2016, Appellants filed a Form 21—an employer’s request for a hearing. (R.p.2).

The issues in this appeal arise out of what happened after Appellants filed their hearing request. The hearing request was filed in mid-January. *Id.* Mr. Buchanan hired a lawyer shortly afterwards—one record says January 25th, see (R.p.10); another says February 2nd. (R.p.5, ¶1). Within weeks Mr. Buchanan’s lawyer filed notice of a workers’ compensation claim and (a short time later) a motion to postpone the hearing in order to allow discovery and to allow Mr. Buchanan to undergo an independent medical evaluation. (R.pp.3-5). The motion explained the IME was scheduled for February 29th and that the report would not be ready in time for the pre-hearing brief deadline. (R.p.5, ¶2). The hearing was set for March 9th. *Id.*

Appellants opposed postponement. (R.pp.7-9). A single commissioner ordered the hearing would go forward and that the record would be left open for the IME. (R.p.11). This order was issued eight days before the hearing. *Id.*

The key issue in the claim is whether Mr. Buchanan’s knee injury affects any other body parts. Appellants argued the case was solely a knee injury. (R.p.15, lines 18-25). Mr. Buchanan claimed his injury caused him to walk with an altered gait, creating back problems. (R.p.16, line 16 - p.17, line 10). Mr. Buchanan described this at the hearing, explaining he does not walk like a normal person, that he limps, that he has a hard time walking, and that his back and knee hurt every day. (R.pp.29-32). This was bolstered by the IME which noted Mr. Buchanan’s altered stride and his use of a cane. (R.p.109).

The single commissioner issued an order finding Mr. Buchanan's back pain was related to his knee injury. The commissioner based this finding on the IME and on Mr. Buchanan's testimony at the hearing, which the single commissioner found to be "very credible." (R.p.61, ¶5). The key parts of the order are factual findings 6 and 8 as well as conclusion of law number 5. (R.pp.59-62). The single commissioner found it was premature to make a permanent award and ordered Appellants to provide Mr. Buchanan with an evaluation by a back specialist of their choosing. (R.p.62, ¶¶7-8).

Appellants sought review by the commission's appellate panel. The appellate panel fully affirmed the single commissioner's decision. (R.pp.136-150).

ARGUMENT

There are two reasons this Court should affirm.

First, the commission is empowered with the discretion to use flexible hearing procedures to receive all the relevant evidence. That discretion includes leaving the evidentiary record open to allow a claimant the full opportunity to present his case and to allow a reasonable opportunity for the claimant's lawyer to conduct discovery. Appellants cannot show an abuse of the commission's discretion given the circumstances.

Second, the commission's decision that Mr. Buchanan's altered gait is affecting his back is not clearly erroneous. The commission chose to credit the evidence supporting Mr. Buchanan's claim. That was the commission's prerogative. The decision below has evidentiary support. The Court should affirm.

I. The commission did not abuse its discretion when it left the evidentiary record open so the commission could receive a medical report that was not available when this claim's hearing began.

The commission is empowered with the discretion to use flexible hearing procedures in an effort to receive all the relevant evidence. That discretion includes leaving the evidentiary record open to receive a medical report like an IME. This is supported by the commission's regulations and by multiple precedents. Appellants cannot show an abuse of the commission's discretion.

a. The commission's regulations give the commission the discretion to use flexible procedures in an effort to receive all relevant evidence.

The commission's regulations explain a single commissioner has discretion to use flexible procedures in an effort to receive all relevant evidence:

This is supported by the commission's regulation on expert reports. It explains the moving party is required to furnish its expert reports at least fifteen days before the hearing and that the non-moving party's reports are due at least ten days before the hearing. S.C. Code Ann. Regs. 67-612(B)(1) and (2) (2012). These requirements are written in mandatory language—reports “must” be provided by these deadlines—but further parts of the regulation explain the requirements are not mandatory. Subsection (E) explains failing to provide a report by the deadline “may” result in the report's exclusion and that a hearing commissioner has discretionary authority to accept “reports, depositions or other evidence” under subsection (J). Subsection (J) explains all available evidence and testimony “shall” be presented at the hearing or a party must move for the hearing's adjournment.

The commission's discretion is also supported by the adjournment regulation. It explains a commissioner may postpone a hearing for good cause and that good cause includes the need to conduct additional discovery. S.C. Code Ann. Regs. 67-613 (2012). It also explains a party may move for adjournment to procure additional evidence "when the evidence is in existence, identified, and necessary for the decision, but unavailable at the hearing." Reg. 67-613(C)(1). This latter procedure is the procedure the commission followed here; beginning the hearing at the designated time, but postponing the hearing's conclusion until after receiving the written report from the IME.

There is nothing indicating the hearing commissioner acted beyond the scope of the discretionary authority these regulations describe. The IME report was a clearly identified piece of evidence, plainly relevant to Mr. Buchanan's claim that his knee injury affects his back. The single commissioner deemed it worthwhile to leave the record open to receive this evidence. The regulations afford a commissioner the discretion for such a decision.

b. Multiple precedents confirm the commission's discretion to use flexible evidentiary procedures.

Precedents confirm the commission's discretion to use flexible procedures. The Supreme Court's decision in *Trotter v. Trane Coil Facility* notes the commission has "wide discretion" in managing a case and that decisions involving continuances and leaving the record open are reviewed for abuse of discretion. 393 S.C. 637, 649-650, 714 S.E.2d 289, 295 (2011). *Trotter* affirmed the commission's decision to leave the record open for one witness' deposition but not another's, noting "[e]very reasonable presumption in favor of a proper exercise of the trial court's discretion will be made." *Id.* at 650, 714 S.E.2d at 295.

Three of this Court’s decisions are similarly instructive. *Fore v. Griffco* reversed the commission for failing to allow the claimant to call a rebuttal witness, noting the absence of a regulation prohibiting amendment of a party’s pre-hearing brief and that proceedings in front of the commission are supposed to be informal. 409 S.C. 360, 373, 762 S.E.2d 37, 44 (Ct. App. 2014). *Hallums v. Michelin* explains an administrative agency like the commission is allowed “wide latitude of procedure” and that when a commissioner elects to receive evidence after the hearing, the effect of that decision is to keep the hearing “in progress” until the evidence is received and the order is issued. 308 S.C. 498, 504-505, 419 S.E.2d 235, 239 (Ct. App. 1992). *Holcombe v. Dan River Mills* is similar to *Trotter*: it affirmed the commission’s discretionary decision to permit some depositions following the hearing but not others. *Holcombe*, 286 S.C. 223, 225-226, 333 S.E.2d 338, 340 (Ct. App. 1985).

The present case is most like this Court’s decision in *Morgan v. JPS Automotives* with an important variation: *Morgan* reversed the commission for failing to leave the record open in similar circumstances. As here, the case was heard on the employer’s “stop pay” application—a request to end temporary benefits and enter a permanent award. Also as here, the claimant gave notice before the hearing that certain evidence (a report from a vocational evaluation) would not be available for the hearing. The commission denied the claimant’s request for the record to be left open, but this Court reversed, explaining the claimant had timely notified the commission and the employer, and that leaving the record open caused no prejudice. 321 S.C. 201, 201, 467 S.E.2d 457, 458-459 (Ct. App. 1996). Here, Mr. Buchanan’s lawyer filed a motion to postpone the hearing, specifically referencing the IME. (R.p.5, ¶2). His pre-hearing brief gave similar notice. (R.p.10, ¶6).

Morgan suggests it would have been reversible error *not* to leave the record open. Mr. Buchanan made a reasonable decision to hire counsel after Appellants requested a hearing. The record indicates Mr. Buchanan’s counsel acted quickly, scheduling an IME at the earliest date available. The record indicates Appellants and the commission had at least two weeks of notice Mr. Buchanan believed the IME was important—the motion to postpone was filed more than two weeks before the hearing date. Mr. Buchanan’s pre-hearing brief specifically indicated he would be claiming the altered gait from his knee injury affects his back and amended Mr. Buchanan’s Form 50 to include this allegation. (R.p.10, ¶12). The commission’s decision to receive the IME in evidence was not an abuse of discretion.

II. The commission’s finding that Mr. Buchanan’s knee injury affects his back is supported by the evidence and is not clearly erroneous.

This issue consolidates Appellants’ issues II through VI, all of which amount to a substantial evidence challenge to the commission’s finding that Mr. Buchanan’s knee injury affects his back and the commission’s refusal to enter an award that was limited to Mr. Buchanan’s knee.

This Court is familiar with the standard of review. The Administrative Procedures Act governs judicial review of the commission’s decisions. *Lark v. Bi-Lo*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). The APA explains a court “may not substitute its judgment for the judgment of the agency as to the weight of the evidence” but may reverse if the commission’s decision violates the law, is made on an unlawful procedure, is affected by an error of law, is clearly erroneous, or is arbitrary and capricious. S.C. Code Ann. § 1-23-380(5) (Supp. 2017).

None of those standards are met here. Mr. Buchanan told the single commissioner he does not walk like a normal person, he limps, he has a hard time walking, and that his back and knee hurt every day. (R.pp.29-32). He told the hearing commissioner he believed his back pain was related to his knee because “[t]he more my knee was hurting, the more my back is hurting.” (R.p.38, lines 23-24). The single commissioner found this testimony to be “very credible.” (R.p.61, ¶5). That finding was confirmed by the appellate panel. (R.p.147, ¶9). The very same sections of the single commissioner’s order and the appellate panel’s order find Mr. Buchanan’s testimony is consistent with the IME report. See (R.p.61, ¶5); (R.p.147, ¶9); and (R.p.109).

Mr. Buchanan was the only person who testified at the hearing, and as his lawyer wrote in his brief to the appellate panel, Appellants never sought a physician’s opinion about Mr. Buchanan’s claim that his altered gait affects his back. (R.p.112). Appellants pointed to the medical records involving Mr. Buchanan’s knee because those records include a rolling notation of “no back pain,” see (R.p.126, lines 5-8) and (R.p.75), but as Mr. Buchanan’s lawyer argued to the panel, Mr. Buchanan’s back pain would obviously not be referenced in those records because the last time Appellants sent Mr. Buchanan to the doctor was in August and the hearing did not occur until the following March, seven months later. (R.p.132, lines 9-16). The commission found Mr. Buchanan’s argument and evidence persuasive. That was a reasonable view of the evidence and should be affirmed. An appellate court is not permitted to engage in fact-finding or to disregard the commission’s view of the evidence, even when reasonable minds could reach different conclusions. *Hartzell v. Palmetto Collision*, 415 S.C. 617, 623, 785 S.E.2d 194, 197 (2016).


CONCLUSION

This Court should affirm. The commission had discretion to leave the record open for the IME and the commission's conclusion that Mr. Buchanan's knee injury affects his back is not clearly erroneous.

November 27, 2017

Respectfully submitted,

SC BAR # 77887

 for Blake Hewitt

Blake A. Hewitt

BLUESTEIN THOMPSON SULLIVAN

P.O. Box 7965

Columbia, SC 29202

(803) 779-7599

(803) 779-8995 (facsimile)

blake@bluesteinattorneys.com

Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1417078
Appellate Case No. 2017-001106

RECEIVED

NOV 27 2017

SC Court of Appeals

Nathan Buchanan, Employee, Claimant Respondent,

v.

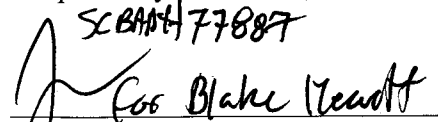
City of Hanahan, Employer,
and State Accident Fund, Carrier, Appellants.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Respondent* complies with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

November 27, 2017

Respectfully submitted,

SCBAH 77887


Blake A. Hewitt
BLUESTEIN THOMPSON SULLIVAN
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)

Attorney for Respondent