THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

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

Kimberly Walker, ... Petitioner,

v.

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

APPENDIX

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Volume III

INDEX

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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2015-000692

Kimberly Walker, Employee, ...Appellant,

v.

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

PROOF OF SERVICE

I certify that I have served the Final Brief of Respondents on Kimberly Walker by depositing a copy of the same in the United State Mail on January 15, 2016, with sufficient postage affixed thereto and return address clearly marked, addressed to her attorneys of record, Stephen B. Samuels, Esquire, and Alton L. Martin, Jr., Esquire, addressed as follows:

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Workers' Compensation Commission

WCC File No. 0901375

Kimberly Walker, Claimant, ... Appellant,

v.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

SECONDARY SOURCES

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.

Respondents state "Appellant's credibility is the most important issue in this claim." [Brief of Respondents, page 10]. In one respect this is true – the Commission erred in rejecting *all* the medical evidence based on an inherently arbitrary and capricious credibility finding. This is the very essence of the "sit and squirm" jurisprudence long condemned by the Federal Courts.[1] Wilson v. Heckler, 734 F.2d 513 (11th Cir. 1984)("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.").

The playbook used by Respondents in this case is a simple one. The medical evidence is overwhelmingly against them. The law is against them. The only way to get around that is an *ad hominem* attack against Walker, painting her as someone undeserving of sympathy and credence, let alone disability benefits. Once the well is poisoned, then the trier of fact simply combs the record for isolated nuggets to bolster this preordained conclusion.[2]

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[1]No South Carolina state court has addressed the issue.

[2]Carl Sandburg expressed the concept in more colorful terms: "If the facts are against you, argue the law. If the law is against you, argue the facts. If the law and the facts are against you, pound the table and yell like hell."

A. Even if the Commissioner found Walker not to be credible, the Commissioner's subjective impressions cannot be used as an artifice to disregard the overwhelming medical and vocational evidence of Walker's disability.

Respondents recite a litany of purported discrepancies within the Commission's Order which they claim "portray Appellant's lack of credibility and obvious desire to embellish her workers' compensation claim for the purpose of secondary gain." [Brief of Respondents, page 11].

The vast majority of these are random isolated instances where Respondents' counsel cross-examined Walker on medical records she had never seen. Others are simply invented from whole cloth – such as finding she gave "detailed and complete answers" to helpful questions and "labored" responses to questions that could have been perceived to not be helpful." [R. p. 38, lines 4-6]. See Hutson v. South Carolina State Ports Authority,732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion because "rank speculation" cannot outweigh competent evidence of disability); Therrell v. Jerry's Inc., 633 S.E.2d 893, 370 S.C. 22 (2006)("Though the workers' compensation commission carries the duty to determine how an injury is compensable, the commission makes this decision based on submitted evidence, not out of thin air.").

As to specific medical records, the Commission improperly and inexpertly focuses on a P-3 Pain Patient Profile administered by Walker's treating psychologist, Dr. Tollison. The P-3 is a test to determine the appropriate treatment plan, taking

into account "[f]actors such as depression, anxiety, and excessive somatic thought." [R. p. 224, line 3]. As to how the P-3 is to be used, it states:

> The information in the P-3 report **must be used in conjunction with professional judgement**, taking into account the total context of the instrument's administration and any other pertinent information conceding the individual. The main body of the report should be considered in professional-to-professional consultation and **should be used solely by the clinician**.

[R. p. 224, lines 14-16].

For the Appellate Panel to use an isolated portion of this report as a proxy for credibility and secondary gain, is highly improper. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012) (constricted based on commissioner's own medical opinion is not substantial evidence and must be reversed). The Commission cannot arbitrarily disregard competent medical evidence.

Dr. Tollison has the professional qualifications to administer and interpret the P3. His review of the original P-3 states:

> The Pain Patient Profile (P-3) psychological test was administered. Review of the Validity Index indicates that the **patient approached the test in an honest manner**. Test scores indicate that **test results may be interpreted with confidence**.
>
> P-3 test scores confirm an intensity of somatization in the top 5th percentile nationally, anxiety in the top 18th percentile, and depression in the top 27th percentile. All P-3 scores are compared to a national sample of patients treated for chronic pain.
>
> P-3 test interpretation suggests **a patient who is constricted and immobilized by multiple pain complaints.** Her physical problems likely occupy much of her attention and concentration. Consequently, she may have difficulty maintaining focus and attention over time due to distraction. She **may exhibit some short-term memory difficulty**.

[R. p. 240, lines 36-39].

Dr. Tollison added "P-3 psychological testing is administered with test results that confirm her symptom intensity." [R. p. 241, lines 32-33].

There is no other competent evidence in the record to refute Dr. Tollison's expert medical opinion. Dr. Tollison never varied from his original opinion. He was the treating psychologist authorized by Respondents to provide psychological treatment to Walker. He assigned a 10% psychological rating stating her "Ability to maintain concentration over time likely reduced secondary to distraction from pain and depression." [R. p. 227, lines 20-21].

Dr. Tollison's opinion is critical in two respects. First, he never questioned her credibility, the validity of her complaints or her motivation. He certainly never suggested she was feigning her symptoms for secondary gain – as alleged by Respondents. Secondly, his psychological diagnosis provides an explanation as to why the Commission erroneously found Walker not credible. His diagnosis of limited "ability to maintain concentration" was misinterpreted by the Single Commissioner who is not a medical expert.

The Commission repeated the same error drawing an isolated diagnosis ("Mood down some. No eye contact. Somewhat manipulative.") from Walker's treating psychiatrist, Dr. Jacobs, and morphing it into some sinister intent on her part. Dr. Jacobs never suggested this translates to a lack of credibility or desire for secondary gain. To him, it was a medical condition requiring treatment. He prescribed two medications to treat "Adjustment disorder with mixed anxiety and depressed mood." [R. p. 254, line 1]. The Commission simply made it up.

Respondents also put great stock in three monetary settlements Walker received in the past from a slip and fall and two car accidents. It is troubling to suggest that anyone who exercises the legal rights long recognized by the courts of this state has done something wrong.

Respondents also contend the fact Walker fought to keep the job she had held for 18 years is somehow evidence of her "testimony and actions to be self-serving and opportunity based." [Brief of Respondents, page 14]. The sole inference that can be drawn from Walker making an EEOC claim is that she wants to work and believes she can work within her restrictions. The fact her long-time employer *could not accommodate her restrictions* merely confirms that she cannot work.

Walker's desire to return to work is, unfortunately, not realistic. Her attempt to get her job back when she physically cannot do it is not substantial evidence that she is not disabled. 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."). As Respondent's vocational expert confirmed, "there are no jobs available for Ms. Walker." [R. p. 752, line 14-p. 753, line 4].

The Commission cannot arbitrarily reject positive medical and vocational evidence of disability based on an inexpert subjective viewpoint cloaked in the guise of "credibility." See McCruter v. Bowen, 791 F.2d 1544 (11th Cir. 1986)(holding that an administrative decision is not supported by substantial evidence where the

ALJ acknowledges only the evidence favorable to the decision and disregards contrary evidence). 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). This case is an archetype of unreliable arbitrary "sit and squirm" jurisprudence. The Commission's credibility findings should be reversed and Walker determined to be permanently disabled as a matter of law.

B. The Commissioner arbitrarily and capriciously disregarded the medical and vocational evidence.

Respondents again argue that "the opinions of Appellant's doctors and the results of her subjective tests are not reliable, as they are based largely on Appellant's subjective complaints and effort." [Brief of Respondents, page 14]. Respondents focus on the Functional Capacity Evaluation.[3]

Respondents first complain that the FCE was "completed prior to Appellant reaching MMI, and it was obtained with the obvious motive of creating a disability claim. The FCE was *destined to be unreliable* before it was even completed." [Brief of Respondents, page 14 (emphasis added)]. This is simply not true. "The nature and timing of [a patient's] visits do not discredit [a provider's] medical opinion." Cranford v. Hutchinson Constr., 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012).

[3]Ironically, a Functional Capacity Evaluation is generally considered to be an *objective* measure of a person's residual physical capacity.

The purpose of an FCE is to determine post-injury physical limitations within the workplace, which then become the foundation for a vocational evaluator's opinion. Respondents had the ability to pay for the original FCE or even to obtain a second FCE. Their failure to do so merely confirms they knew they could not contest the validity of the restrictions – a failure Respondents aptly describe as "***appropriate inaction***." [Brief of Respondents, page 14 (emphasis in original]. "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence." John Adams, Argument in Defense of the Soldiers in the Boston Massacre Trials, December 1770.

An FCE is typically performed shortly before MMI. It is the last step for the physician in gathering information for filling out the Form 14B required by the Commission. Dr. Piasecki recommended the FCE on September 18, 2012 in anticipation of MMI. [R. p. 148, line 5]. The FCE was done on October 25, 2012. [R. pp. 340 - 351]. Dr. Piasecki placed Walker at MMI on *the first visit following the FCE* – on November 21, 2012 with permanent restrictions based on the FCE. [R. p. 144].

Furthermore, Dr. Piasecki explicitly opined that "... the restrictions provided in that FCE . . . [m]ost probably remain an accurate description of Ms. Walker's physical limitations." [R. p. 134, lines 17 - 18]. Per the FCE, Walker "... 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, lines 38-40].

Walkers' treating pain management physician, Dr. Math, also reviewed the FCE. [R. pp. 340-351]. "[Dr. Math] agree[d] with the permanent physical restrictions provided by the FCE. **Ms. Walker most probably cannot perform the full range of sedentary work.**" [R. p. 304, (emphasis added)]. Notably, on February 4, 2013, Dr. Math "spoke with the [physical] therapist who felt as though the [patient] gave good effort, but would likely be able to do more if she went through a formal work hardening program."[4] [R. p. 308, lines 26-28].

Despite the unchallenged expert opinions of Walker's primary treating doctors regarding her physical restrictions, the Commission arbitrarily rejected the medical evidence. This is not a situation where the Commission had to choose between contradictory medical opinions – here the medical evidence is all one way.

The Commission and Respondents try to pick apart the FCE looking for "discrepancies." Some of the so-called discrepancies are blatant misinterpretations of data which only the examining therapist and doctors are qualified to interpret. For example, the Commission noted testing on carrying, pushing and pulling was "incomplete," as was testing on stooping, kneeling, squatting and climbing stairs. The tests were incomplete because Walker was *physically unable* to complete the tests. These are not discrepancies – they are limitations in her physical capacity.

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[4] Respondents had refused to provide the work hardening. The Commission ruled "Claimant is also entitled to a work-hardening program of Defendants' choosing, should an authorized treating physician order it." [R. p. 77, lines 21-22]. As the work hardening was never provided, the subsedentary restrictions assigned by the doctors are the maximum level at which Walker could perform. Respondents should not benefit from their "appropriate inaction" in refusing to offer Walker rehabilitative services ordered by the Commission.

The most egregious example of "sit and squirm" jurisprudence is the hearing commissioner's observation that during the two hour and forty-minute hearing, Walker "only stood three times during the hearing and for less than one minute each time." [R. p. 70, lines 22-23]. Respondents contend this is a discrepancy from the FCE when she "had to perform intermittent weight shifting during seated tasks." [Brief of Respondents, page 17 (quoting R. p. 351, lines 6-7 and R. p. 70, lines17-19)]. The Commission left out the consistent language from the FCE summary, to wit: "There were several occasions when the evaluee had to shift from sitting to standing during a task or shift from standing to sitting." [R. p. 351, lines 8-9]. There is no discrepancy. The Commission simply ignored evidence that did not fit with their irrational dislike of Walker. See McCruter v. Bowen, 791 F.2d 1544 (11th Cir. 1986)(holding that an administrative decision is not supported by substantial evidence where the ALJ acknowledges only the evidence favorable to the decision and disregards contrary evidence).

The FCE examiner stated "The results of this evaluation suggest that the evaluee gave a reliable effort, with 15 of 20 consistency measures within expected limits." [R. p. 351, lines 2-4]. The treating doctors and the therapist agreed the FCE was a valid measure of Walker's physical limitations. The validity of the test is a question for the expert; not a lay commissioner with no specialized medical knowledge. 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).

Respondents argue the well established maxim that "No fact finding body is compelled to *blindly* accept an expert's opinion." [Brief of Respondents, page 18 (emphasis added)]. While this maxim is correct insofar as it goes, it yields to the even more fundamental rule that a decision cannot be based on 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.").

The evidence here is all one way. The restrictions as shown on the FCE are a valid measure of Walker's limitations. The findings to the contrary are arbitrary, capricious, and speculative. They are not supported by substantial evidence and must be reversed.

C. The Commissioner arbitrarily and capriciously disregarded Jan Westmoreland's deposition testimony wherein she opined "to a reasonable degree of vocational certainty that there are no jobs available for Ms. Walker.

Respondents contend Jan Westmoreland's opinion *alone* is substantial evidence that Walker is not permanently and totally disabled. The mere fact that an expert gives an opinion on issue is not dispositive, neither of the issue or the opinion itself. Fundamentally any expert opinion must have a foundation in the evidence (particularly when the expert is hired solely to give an opinion). 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."). Without a foundation, an expert opinion is an exercise in sophistry and speculation.

While it is true that a few very exceptional people are able to work with profound physical limitations – Christopher Reeve and Stephen Hawking for example – disability in workers' compensation is not measured by the exception. The test for disability is whether the employee is unable to perform services other than those that are "so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist." See, e.g. Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961).

When Westmoreland was asked to apply the test for disability to Walker's physical limitations, her opinion was unequivocal: "there are no jobs available for Ms. Walker." [R. p. 752, line 14-p.753, line 4]. This testimony ends the matter. No matter how much one contorts an "unusual finesse of reasoning" to conclude otherwise, Westmoreland's testimony confirms that Walker is totally disabled as a matter of law.

The Appellate Panel should be reversed and directed to award Walker benefits for permanent and total disability.

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

Respondents argue that Appellant is barred from filing a later change of condition because Appellant contended she was at MMI. Had Walker prevailed in her "position that she is at maximum medical improvement, and that she is totally

and permanently disabled," then the possibility of a future change of condition would be moot. Walker would have been awarded lifetime medical treatment – necessarily including all future surgeries. See S.C. Code Ann. §42-15-60 (2007)("In cases in which total and permanent disability results, [medical] treatment or care shall be paid during the life of the injured employee, without regard to any limitation in this title including the maximum compensation limit.).

The fact the Appellate Panel found Walker to be at MMI but only partially disabled, leaves the door open to establish a change of condition as a matter of law. See S.C. Code Ann. §42-17-90 (2007)("the commission may review an award and on that review may make an award ending, diminishing, or increasing the compensation previously awarded, on proof by a preponderance of the evidence that there has been a change of condition caused by the original injury, after the last payment of compensation. "). This is a substantial right granted by statute, which is beyond the authority of the Commission to deny prospectively or procedurally.

The error here is in the Appellate Panel foreclosing any change of condition on the false ground that surgery is merely "palliative care." See Clark v. Aiken County Government, 366 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005). A surgery will undoubtedly cause at minimum some period of temporary total disability. It could ultimately improve Walker's condition or it could ultimately worsen it. Hypothetically, she could lose her leg or even die from the surgery. The point is not that things will necessarily happen. The point is that for the Commission to bar Walker prospectively from filing a change of condition is arbitrary and speculative,

along with a denial of a substantial right. If the Commission cannot include the risks of surgery in the original disability award, so it cannot deny Walker the ability to raise a change of condition for the worse in the future.

Judicial Estoppel

Respondents contend "even if Appellant had a valid argument [that future surgery would affect her MMI status], Appellant is estopped from taking this position under the doctrine of Judicial Estoppel. Judicial estoppel does not apply here as Appellant is not a prevailing party and received no benefit.

The elements of judicial estoppel are: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004).

Respondents argue that because Walker contended she was at MMI, she cannot now contend she would not be at MMI if she has surgery or otherwise suffers a change of condition for the worse. However, Walker argued she was at MMI *and* totally disabled. She lost on the issue of total disability. As such, she received no benefit from the position she took at the hearing.

Now, she is forced to adopt an alternative position on appeal – not to mislead the court, but to preserve rights taken away from her by an erroneous ruling in a

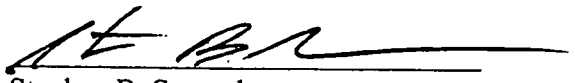
hearing she lost. Furthermore, there is nothing inconsistent here. Once she was not found permanently and totally disabled, she is forced to adopt an alternate position created by the hearing commissioner's ruling. Because the ruling was raised on appeal from the hearing commissioner, Walker has preserved the right to raise the exception. Cf. Green v. City of Columbia, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993)(once erroneous ruling of single commissioner was unappealed and became the law of the case, the respondent could rely on the fact that it did not have to address the issue on review by the full commission).

The Court should reverse the finding that Appellant is barred from filing a change of condition and remand for a change of condition hearing.

CONCLUSION

For the foregoing reasons, the Decision and Order of the Appellate Panel should be reversed. The Court should reverse the Commission and hold Walker is entitled to compensation for permanent and total disability along with lifetime medical treatment. Even if the Court affirms the disability award, the Court should reverse the finding limiting medical treatment and potentially precluding a change of condition.

Respectfully Submitted



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I certify that I, Katherine Carter, am a paralegal to Stephen B. Samuels and I have caused the final **Brief of Appellant** and final **Reply Brief of Appellant** to be served on the parties below, by placing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below, addressed as follows:

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