

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1512220
Appellate Case No. 2017-001947

RECEIVED
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SC Court of Appeals

Rico A. Dorsey, Employee, Appellant,

v.

Allwaste Services, Inc., Employer,
and Bridgefield Casualty Insurance,
c/o Summit Holding, Inc., Carrier, Respondents.

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STATEMENT OF ISSUE ON APPEAL

Whether the Workers' Compensation Commission abused its discretion in refusing to leave the trial record "open" for two evidentiary depositions and in entering a final award when there was no sensible reason to cancel the depositions and when the circumstances indicate the disallowed testimony would likely have been material to the outcome.

STATEMENT OF THE CASE

This case is about the Workers' Compensation Commission's discretionary power to leave the record "open" after a hearing to allow the submission of all relevant evidence. The main authorities involved are two regulations—S.C. Code Ann. Regs. 67-612 and -613(____)—as well as cases interpreting these regulations.

Rico Dorsey was working as a trash collector when he got hit by a garbage truck in July of 2015. The truck backed into Mr. Dorsey while he was walking to get a trash can. (Dorsey Dep.p.41, line 16 - p.43, line 5). Mr. Dorsey said the impact pushed him about ten feet. (Id. at 45, line 16). The can ended up under the truck. (8/3/16 Tr.p.124, lines 22-24).

This was a low-speed collision, (Defs' 7/6/16 APAp.22), but it was significant. Doctors put Mr. Dorsey on restricted duty for two months limiting him to sedentary work, (Clmt.APApp.186-187), and that was just the beginning. Mr. Dorsey was later written completely out of work. (Id.pp.188). He would remain that way until February of 2016, seven months after the truck backed into him. (Id.pp.189-192).

Mr. Dorsey filed a request for a hearing with the commission in September of 2015, two months after the accident. (Form 50 of 9/4/15). He alleged injuries to his back, legs, and elbows. *Id.* He withdrew the hearing request after his employer accepted the claim. (Claim withdrawn e-mail thread from 10/15/15 and 10/21/15).

The employer did not accept the whole claim. It only accepted the low back injury. This is indicated by statements at the hearing and by medical records reflecting the employer did not approve treatment to other body parts. (8/3/16 Tr.p.15, lines 19-21); (Clmt.APApp.43, 45) (referencing potential treatment to Mr. Dorsey's right arm).

This appeal concerns the commission's denial of a request to leave the evidentiary record open for the depositions of two physicians who treated Mr. Dorsey in the months preceding the hearing. A brief summary of Mr. Dorsey's course of medical treatment is necessary to put this evidence and the case's procedural history in context.

Mr. Dorsey's chief complaint has been back pain and the side effects commonly accompanying back pain such as radiating pain in the arms and legs. The earliest medical record describes the pain as "dull" and in the upper right back and left lower back. (Defs' 7/6/16 APAp.28). Subsequent records describe "back and left sided rib pain," (Id.p.34), pain across Mr. Dorsey's lower back and into his legs, (Clmt.APApp.43), and pain that "starts in his neck and goes all the way down his left leg." (Id.p.54).

From September of 2015 to February of 2016 Mr. Dorsey worked his way through employer-provided doctors. First, he got pain medicine and physical therapy. (Id.pp.1-3, 10-12). When those things did not work he was sent to an orthopedic office. (Id.pp.15-17).

At the orthopedic office Mr. Dorsey was given a brace, diagnostic testing, and referred for an epidural steroid injection. (Id.p.56) (in "discussion notes"). When the injection did not help, Mr. Dorsey was referred to a surgeon in the same practice group for an evaluation. (Id.p.64) (again, in "discussion notes"). The referring doctor wrote he did not have anything further to offer Mr. Dorsey and "[n]othing has helped." (Id.p.64).

The surgeon reviewed Mr. Dorsey's records and determined Mr. Dorsey was not a surgical candidate. (Id.p.68). The surgeon also said he believed Mr. Dorsey had been treated adequately, that Mr. Dorsey did not have any permanent impairment to his back, and that Mr. Dorsey had reached maximum medical improvement. *Id.*

At that point, Mr. Dorsey's employer filed a request for a hearing seeking an order allowing the employer to stop paying temporary disability benefits. (Form 21). The employer also sought a finding that Mr. Dorsey had no permanent disability based on the surgeon's finding of no permanent impairment. *Id.* The employer filed this hearing request in February of 2016, roughly seven months after the truck hit Mr. Dorsey.

Mr. Dorsey continued seeking medical treatment after his employer ceased authorizing any care for him. He went to the hospital three times in February and March of 2016 complaining of back pain. (Clmt.APApp.37, 96-97, 125-127). In April he was evaluated at the Southeastern Spine Institute in Charleston, where the physicians agreed Mr. Dorsey was not a surgical candidate. (Id.pp.157-158, 162). A doctor recommended Mr. Dorsey have another epidural steroid injection. (Id.pp.165-167). Medical records indicate Mr. Dorsey responded well to this injection. (Id.pp.179-180). The doctor managing this portion of Mr. Dorsey's care noted Mr. Dorsey's neck needed evaluation. (Id.p.179).

A single commissioner conducted a hearing on the employer's motion in August of 2016. (8/3/16 Tr.p.1). Mr. Dorsey provided the only live testimony. (Id.p.3).

The central issues at the hearing were whether Mr. Dorsey had reached MMI, whether he had any permanent impairment, and whether any other parts of his body had been injured or were affected by the injury. (10/4/16 Or.p.5).

The hearing also involved whether the evidentiary record would be left open to receive the deposition testimony of two doctors from the Southeastern Spine Institute. The hearing occurred August 3, 2016. (8/3/16 Tr.p.1). The depositions were set to occur August 8, 2016 and August 18, 2016.

The employer noticed these depositions. It also designated them as exhibits in its pre-hearing filings with the commission and asked the commission to leave the record open to receive the depositions in evidence. (Defs' 7/7/16 Form 58, ¶8 & Not.ofWit.). Mr. Dorsey agreed the depositions were necessary and made a similar request. The single commissioner noted Mr. Dorsey's request in the hearing transcript. (8/3/16 Tr.p.155, lines 12-19).

At the hearing, however, the employer indicated it did not wish to proceed with the depositions. The employer initially said it had not decided whether to take the depositions. (8/3/16Tr.p.11, lines 6-8). The employer concluded the hearing by stating its withdrawal of the request to conduct the depositions was contingent on whether Mr. Dorsey's request for the depositions would be allowed. (Id.p.154, line 20 - p.155, line 7). The employer wanted to question the doctors first if the depositions went forward. *Id.*

In October of 2016, the single commissioner issued a final award. (10/4/16 Or.pp.1-19). The single commissioner found Mr. Dorsey was at MMI and had an 8% impairment to his back. (Id.p.17, ¶¶7 & 8). The commissioner also found no other body parts were injured or affected. (Id.p.17, ¶¶5 & 6).

Regarding the depositions, the single commissioner said both parties requested the record be held open for the depositions and that “[b]oth requests are denied[.]” (Id.p.16, ¶2). The order does not contain any explanation of this decision.

Mr. Dorsey appealed the single commissioner's decision. An appellate panel affirmed the single commissioner, but modified the decision by holding the applicable regulation was the regulation concerning a party's pre-hearing brief, Reg. 67-611. (7/14/17 Or.pp.6-7, ¶3). The appellate panel noted parties are required to supplement and amend their pre-hearing briefs. *Id.* The appellate panel also held the regulation concerning expert reports—Reg. 67-612—did not apply to expert *depositions*. (Id.p.7, ¶4).

Mr. Dorsey asked for rehearing 30 days after the appellate panel's order (Mot.1-11).

The commission denied rehearing August 21, 2017. (8/21/17 Or.). Mr. Dorsey served the notice of appeal September 20, 2017.

There is more to the history of this case than the foregoing summary. It was difficult to get this case to a hearing. A statute says this sort of hearing "must be conducted" within sixty days of the hearing request. See S.C. Code Ann. § 42-9-260(D) (____). This did not occur because Mr. Dorsey's sole counsel for much of this case was a member of the General Assembly and the hearing request was filed near the beginning of the legislative session.

The merits were also a little contentious. The parties argued over the details of the accident even though the injury was admitted. They disputed whether Mr. Dorsey hit the ground, whether anyone saw the incident, and whether the truck driver was immediately told she hit Mr. Dorsey. There were objections to Mr. Dorsey's evidence. When the case was set for a hearing in July, see (8/2/16Or.), the employer moved to exclude Mr. Dorsey's medical evidence as untimely because most of it was not served until eight days before the hearing rather than ten days, as a regulation requires. (8/3/16Tr.p.5, ll. 5-20). More evidence was served two days before the July hearing date. *Id.*; see also (Clmt.Supp.Not.7/20/16).

These disputes are only mentioned in an effort to present a candid summary of the case. They do not affect the issue on appeal.

ARGUMENT

There are three reasons this Court should reverse the commission and remand this case so the depositions can be conducted.

First, the commission's orders do not make sense. The single commissioner and the appellate panel told different versions of the facts, and where the single commissioner's decision gave no reason at all for disallowing the depositions, the appellate panel provided an illogical reason and relied on the wrong regulation.

Second, there was ample notice of the need for these depositions, there was no legitimate claim of prejudice, and there was frankly no sensible reason to deny the request that the depositions move forward. Precedent says the commission enjoys considerable latitude with respect to decisions about how to manage a trial, but precedent also says a claimant who inadvertently omits skilled medical testimony should be afforded the opportunity to present such testimony "in the interests of justice." Nobody would notice the depositions of their own experts when the opposing party has already noticed the same depositions. The depositions should have come in, as the pre-hearing filings contemplated.

Finally, the circumstances indicate this testimony would likely have been material. The award has inconsistencies and errors, and when the issues being tried are whether an injured worker has reached a medical plateau, whether further care is warranted, and whether other body parts are affected, it only makes sense to hear from the doctors giving the most recent treatment. The commission abused its discretion. This Court should reverse.

I. The commission's orders do not make sense, giving different versions of the facts and articulating an illogical reason that is inconsistent with precedent.

Leaving the evidentiary record “open” is the colloquial way of describing the process of temporarily adjourning a hearing in order to admit evidence that is not available on the hearing date. The simple procedure is outlined in Regulation 67-613C, which explains a party may move “at a hearing” for adjournment to procure certain additional evidence or if a witness fails to appear.

Precedent says the commission has a lot of latitude with respect to its decisions about whether to leave the record “open.” In *Trotter v. Trane Coil Facility* the Supreme Court noted the commission has “wide discretion in managing a case” and that “[e]very reasonable presumption in favor of a proper exercise of the trial court’s discretion will be made.” 393 S.C. 637, 650, 714 S.E.2d 289, 295 (2011).

But precedent also says that when a claimant provides notice of his or her request to offer additional proof of a claim, the hearing’s temporary adjournment “causes no prejudice.” This Court reversed the denial of such an adjournment request in *Morgan v. JPS Automotives*, explaining the claimant’s request for the commission to consider the forthcoming report of an expert should have been granted “in the interest of justice.” 321 S.C. 201, ___, 467 S.E.2d 457, 459 (Ct. App. 1996).

The first problem with the commission’s orders is that they do not make sense. The single commissioner’s order says both parties asked the commission to hold the record open for the depositions and gives no reasons for denying the joint request. (10/4/16 Or.p.16, ¶2). The appellate panel told a different version of the facts and relied on a different rule than the

one regarding adjournment—the panel wrote the employer’s request to proceed with the depositions was contingent on whether Mr. Dorsey’s request to leave the record open would be granted and the panel found “Regulation 67-611 is applicable.” (7/14/17 Or.p.6, ¶3). Regulation 67-611 describes the pre-hearing briefs parties are required to file in advance of a hearing. The appellate panel seemed to find Mr. Dorsey’s pre-hearing brief was deficient because he did not list the doctors he wished to depose. *Id.*

The appellate panel’s reasoning is legally erroneous. The controlling regulation is Reg. 67-613—“Postponment or Adjournment of the Scheduled Hearing”—not the regulation dealing with pre-hearing briefs. The adjournment regulation states the request can be made “at a hearing,” Reg. 67-613C, and it is important to note the parties did not contest notice. These doctors had already been listed on the employer’s pre-hearing submissions. (Defs’ 7/7/16 Form 58, ¶8 & Not.ofWit.). The single commissioner acknowledged Mr. Dorsey echoed the employer’s initial request to leave the record open. The right to request adjournment does not rely on whether a party redundantly lists the desired evidence on its own pre-hearing brief after the moving party has already designated the same evidence.

The abuse of discretion standard can be hard to overcome, but it is not hard when the commission gives reasoning that is nonsensical and legally erroneous. A tribunal abuses its discretion when its findings lack factual support or when its conclusions are controlled by an error of law. *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008). Here, the single commissioner was wrong factually in that both parties did not ultimately ask for the record to be left open—the employer changed its mind. The appellate panel’s error was legal, relying on the wrong regulation rather than the correct one.

II. There was ample notice of the need for these depositions, there was no legitimate claim of prejudice, and there was no sensible reason to deny the request that the depositions go forward.

The second problem with the commission's decision not to allow the depositions is that there was ample notice of the need for the depositions, there was no legitimate claim of harm from allowing them, and there was frankly no sensible reason to deny the request that the depositions move forward.

Two of this Court's decisions are relevant to this argument. *Morgan v. JPS Automotives* involved the commission's refusal to leave the record open to receive a report from the claimant's vocational expert. The vocational expert had reviewed the claimant's records but was not able to examine the claimant until after the hearing date. The commission denied the request to leave the record open, but this Court reversed, explaining there was no prejudice to the employer. 321 S.C. at ___, 467 S.E.2d at 459.

The second case is *Brown v. La France Industries*, a decision affirming the commission's decision to leave the record open. In rejecting an argument that the commission should not have allowed the claimant to take an additional deposition, this Court cited an Oklahoma case for the proposition that when a claimant inadvertently omits important evidence, the claimant should be afforded an opportunity to present the evidence "in the interests of justice." 286 S.C. 319, 324, 333 S.E.2d 348, 351 (Ct. App. 1985).

There are some obvious factual distinctions between these cases and the present case, but those differences do not matter in the analysis.

In *Morgan*, for example, the claimant listed the vocational expert on her pre-hearing brief, giving a clear signal that this testimony was important to the claimant's case. Here,

the circumstances are different—Mr. Dorsey did not list the depositions in his pre-hearing brief—but the employer had already listed the depositions as part of its case. The employer had also asked for the record to be held open, and Mr. Dorsey concurred with this request. Just as in *Morgan*, there was ample notice this evidence was contemplated. Indeed, both depositions were scheduled to occur within days of the hearing. And just as in *Morgan*, there is no conceivable claim of prejudice. Developing a full record does not prejudice anyone.

The obvious difference between Mr. Dorsey’s case and this Court’s decision in *Brown* is that here the commission denied the request to leave the record open while *Brown* involved a decision allowing such a request. Still, though, *Brown* points towards reversal being appropriate rather than affirmance. *Brown* discusses evidence being “inadvertently” omitted from a party’s case. 286 S.C. at 324, 333 S.E.2d at 351. That is precisely what happened below. Nobody in Mr. Dorsey’s position would depose his own experts or pay them for a written report when the opposing party has already noticed the same depositions. The party would understandably plan to cover everything with his own experts after the employer completed its questioning.

Contrast this case with the circumstances in *Trotter*, where a party had a strategic reason for passing on a prior opportunity to depose an expert and then later sought to leave the record open for that expert’s deposition. 393 S.C. at 649, 714 S.E.2d at 295. Here, Mr. Dorsey had every reason to expect the depositions would proceed and every reason to plan on eliciting testimony from his experts during that deposition.

The commission has the freedom to follow relatively informal and flexible procedures that are designed to save costs while accepting all evidence that is relevant to a

workers' compensation claim. A statute explains the rules of evidence do not apply and that parties may submit "any part of the evidence" in written form to expedite the hearing. S.C. Code Ann. § 1-23-330(1) (Supp. ____). The parties are required to exchange expert reports before the hearing. Reg. 67-612. The same rule explains all available evidence is to be presented at the hearing "or a party may move for adjournment[.]" Reg. 67-612J.

The rules also have language prohibiting parties from keeping certain evidence away from the commission. Reg. 67-612D explains that any expert report provided to an opposing party before the hearing "shall be submitted" in evidence unless it is withdrawn with the other party's consent. The depositions in this case are more like an expert "reports" than they are like any other type of evidence. These doctors were not fact witnesses. Doctors routinely summarize a patient's medical treatment, offer opinions on causation, and describe a patient's future prognosis.

The procedure in this case did not follow these guiding principles. Closing the record and canceling the depositions was inflexible, and flexibility mattered here because the commission faced the unusual situation of a party changing its position at the last minute. There was ample notice of the need for the depositions, there was no legitimate claim of harm from allowing them, and there was frankly no sensible reason to deny the request that the depositions move forward.

III. The decision to close the record was not harmless error, as the circumstances indicate the deposition testimony would likely have been material.

It is hard to make sense out of some of the commission's findings. The commission said Mr. Dorsey did not complain about problems with his neck until his deposition, (7/14/17

Or.p.7, ¶7), yet medical records indicate that within four months of being hit by the truck Mr. Dorsey complained his pain started in his neck and ran all the way down to his left leg. (Clmt.APAp.54). The commission did not find any disability in Mr. Dorsey's right arm, (7/14/17 Or.p.6, ¶6), but contemporaneous medical records prove treatment to the arm was never authorized. (Clmt.APApp.43, 45). Indeed, according to the record Mr. Dorsey's right arm and neck have never even been definitively *evaluated*. The deposition testimony would likely have covered why such an evaluation was or was not necessary.

Fairness requires acknowledging there are some odd things in the order that come out in Mr. Dorsey's favor. The commission found Mr. Dorsey had an 8% back disability, (7/14/17 Or.p.8, ¶9), rather than the 0% rating from the doctor who said Mr. Dorsey was at MMI. (Form 14B). The commission awarded Mr. Dorsey future medical treatment, (7/14/17 Or.p.8, ¶10), even though the doctor who found Mr. Dorsey at MMI gave Mr. Dorsey a full release and said no future treatment was needed. (Form 14B).

Here again, these things cut in favor of a finding the excluded evidence would likely have affected the outcome. The commission seems to have found value in the treatment Mr. Dorsey received at Southeastern Spine and disagreed with the MMI doctor on certain points. Mr. Dorsey did not have good outcomes until he went to Southeastern Spine. It stands to reason that hearing from the Southeastern Spine physicians who have been administering Mr. Dorsey's latest course of treatment would likely have been useful. When the issues being tried are whether an injured worker has reached a medical plateau, whether further care is warranted, and whether other body parts are affected, it only makes sense to hear from the doctors who have given the most recent treatment.

CONCLUSION

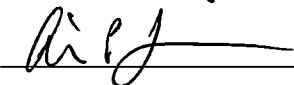
This Court should reverse the commission and remand this case for the depositions to be conducted and placed in evidence. The commission has considerable latitude in setting the parameters of the reconvened hearing. *Smith v. S.C. Dep't of Mental Health*, 329 S.C. 485, 501, 494 S.E.2d 630, 638 (Ct. App. 1997) (the commission may conduct a de novo hearing or may rely on the testimony previously given, and the commission is free to order any additional medical or vocational evaluations as it deems proper).

Respectfully submitted,

February 12, 2018

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Rico A. Dorsey, Appellant,

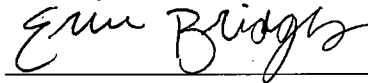
v.

Allwaste Services, Inc., Employer,
and Bridgefield Casualty Insurance,
c/o Summit Holding, Inc., Carrier, Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served
counsel for the Respondents with a copy of the *Initial Brief of Appellant and Designation
of Matter to be Included in the Record on Appeal* by mailing copies of the same by
United States Mail with first class postage prepaid to the following address:

Nicolas L. Haigler
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Erin Bridges

February 12, 2018

February 12, 2018

VIA HAND DELIVERY

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
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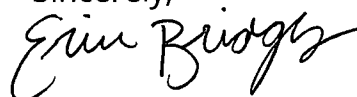
RE: Rico A. Dorsey v. Allwaste Services, Inc.
Appellate Case No.: 2017-001947

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of the *Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal* in reference to the above matter. I have also enclosed a proof of service of this document on counsel for the Respondents. Please return the additional filed copies to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,



Erin Bridges
Paralegal to Blake A. Hewitt
BLUESTEIN THOMPSON SULLIVAN, LLC

/emb

Enclosures

cc: Andrew N. Safran, Esquire
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