

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SCWCC Case No. 1209393

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SC Court of Appeals

Matthew Edwards, Employee,

Appellant,

v.

SC Department of Public Safety, Employer,
and State Accident Fund, Carrier,

Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

- I. DOES SUBSTANTIAL EVIDENCE SUPPORT THE COMMISSION'S FINDING THAT EDWARDS IS NOT PERMANENTLY AND TOTALLY DISABLED AS A RESULT OF HIS JULY 16, 2012 WORK INJURY?
- II. DID THE COMMISSION'S FINDING THAT EDWARDS IS NOT ENTITLED TO A LUMP SUM PAYMENT OF THE AWARD CONSTITUTE AN ABUSE OF DISCRETION?

STATEMENT OF THE CASE

Appellant Matthew Edwards ("Edwards") sustained an admitted injury to his lower back and right leg arising out of and in the course of his employment with the South Carolina Department of Public Safety ("SCDPS") on July 16, 2012, when he slipped while walking down a flight of stairs. Defendants provided Edwards with appropriate medical treatment, and on May 6, 2013, Dr. Loudermilk, the treating pain management physician, opined Edwards had reached maximum medical improvement.

On April 11, 2014, Edwards filed a Form 50, Request for Hearing, contending he was permanently and totally disabled. (R. p. 46). Defendants timely filed a Form 51 on April 30, 2014 admitting an injury to the back and right leg, but denying Edwards was permanently and totally disabled. (R. p. 47). Based on the nature of Edwards's allegations, mediation was ordered pursuant to Regulation 67-1802. Following an impasse at mediation, a hearing was ultimately held before Commissioner Avery B. Wilkerson, Jr. ("the Single Commissioner") on July 14, 2015. (*See* R. p. 51).

At the hearing, Edwards maintained he was permanently and totally disabled as a result of his work injury, and he requested a lump sum payment of any award. (R. p. 58, lines 5-8). With regard to SCS recommended by Dr. Loudermilk, Edwards admitted he did not wish to have it at this time; however, he argued the option of a SCS should remain open to allow him to pursue it at any time in the future. (R. p. 55, line 7-p.56, line 2). Defendants denied Edwards was permanently and totally disabled and noted the FCEs, which indicated Edwards was capable of working, as well as the vocational opinion of James Myers. (R. p. 60, line 8-p.61, line 4). Defendants further argued it would be speculative to find Edwards permanently and totally disabled given his refusal to accept recommended medical treatment

that would likely lessen his period of disability, specifically a SCS. (R. p. 60, lines 8-11). Defendants took the position that Edwards was entitled to a permanent partial disability (“PPD”) award to his back under §42-9-30. (R. p. 61, lines 4-6). Defendants also raised issues with Dr. Burnette’s calculation of Edwards’ impairment rating and objected to a lump sum payment of benefits given the likely change of condition for the better should Edwards pursue the recommended SCS, which Defendants authorized. (R. p. 61, lines 6-25).

On November 9, 2015, the Single Commissioner issued his Decision & Order finding Edwards reached maximum medical improvement on May 6, 2013. (R. pp. 1 & 24). He further found that Edwards failed to meet his burden of proof that he is permanently and totally disabled as a result of his July 16, 2012 work accident. (R. p. 25). The Single Commissioner awarded Edwards 45% PPD to his back, and he found that Edwards was not entitled to a lump sum payment of benefits since there was a greater than usual chance of a change of condition for the better in the future. Id. With regard to future medical treatment, the Single Commissioner found Edwards was entitled to ongoing pain management treatment per Dr. Loudermilk. Id.

Edwards subsequently filed a Form 30, Request for Commission Review, on November 23, 2015. (R. p. 48). Oral arguments were presented before an Appellate Panel on February 22, 2016, and on May 20, 2016, the Appellate Panel issued its Order unanimously affirming the Single Commissioner’s Order in its entirety. (See R. pp. 28-44).

Thereafter, Edwards filed his Notice of Appeal with the South Carolina Court of Appeals on May 26, 2016. (R. p. 50).

STATEMENT OF THE FACTS

Edwards was hired by the SCDPS as a transport police officer in October 2007. (R. p. 106, lines 17-19). On July 16, 2012, Edwards was working at a weigh station on Interstate 85. (R. p. 80, lines 18-23). As he was walking down the stairs of the tower to perform a safety check on a truck, he slipped on a step and developed pain in his back radiating down his right leg. (R. p. 80, line 24-p.81, line 18). Edwards initially sought medical treatment on his own with a chiropractor the following day. (See R. p. 374).

On July 30, 2012, Edwards was seen by Dr. Rico Aragon at Oaktree Medical Centre, who ordered a lumbar spine MRI. (R. pp. 303-304). An MRI of Edwards's lumbar spine, dated August 1, 2012, showed a "[m]igrated fragment from the L5-S1 disc into the right S-1 lateral recess severely compressing the right S-1 transverse root." (R. p. 326). Edwards was subsequently referred to Dr. Michael N. Bucci for a neurosurgical consultation. (R. pp. 314-317). On September 11, 2012, Dr. Bucci reviewed the MRI and recommended surgical intervention. Id. Edwards underwent a right L5-S1 laminectomy, facetectomy, foraminotomy, and discectomy on October 1, 2012. (R. pp. 318-319). Following surgery, Edwards underwent a course of physical therapy. (R. pp. 321-322). On December 6, 2012, he returned to Dr. Bucci and reported therapy had helped his strength, but not his right leg discomfort. (R. p. 322). Due to his ongoing complaints, Dr. Bucci recommended a repeat lumbar MRI, which was performed on December 10, 2012. (R. pp. 322 & 327).

On January 3, 2013, Dr. Bucci reviewed the updated MRI and noted it revealed postsurgical changes with no recurrent disc herniation or nerve compression. (R. p. 324). Dr. Bucci diagnosed Edwards with lumbar radiculopathy and residual nerve pain, and he recommended a pain management consultation. Id. Dr. Bucci also opined Edwards could

return to light duty work with a 30 pound weight limit. (R. p. 376). SCDPS accommodated the restrictions assigned by Dr. Bucci, and Edwards returned to light duty work in January 2013. (R. p. 110, lines 8-10).

On February 4, 2013, Edwards began treating with Dr. Eric Loudermilk of Piedmont Comprehensive Pain Management Group. (R. p. 273). Edwards reported improved back pain since surgery, but complained of ongoing right leg pain. Id. Dr. Loudermilk diagnosed him with persistent right lower extremity radiculopathy, and he ordered a S1 nerve root injection. (R. p. 274). While Dr. Loudermilk also offered Edwards medications to help alleviate his pain, he noted Edwards “does not wish to be on any medications because he probably would not take the medication anyway.” Id. On March 11, 2013, Edwards denied obtaining any significant relief from the injection, and Dr. Loudermilk opined he had a permanent nerve injury. (R. p. 276). He prescribed Gralise and provided Edwards with information on a SCS. Id. On April 1, 2013, Edwards reported he could not tolerate Gralise and that he “does not want to take medications.” (R. p. 277). Edwards was also not interested in the SCS procedure. Id. Dr. Loudermilk recommended 4 more weeks of physical therapy followed by an FCE. Id.

On April 23, 2013, Edwards underwent an FCE at Doshier Physical Therapy Associates. (R. pp. 360-372). The FCE revealed he was capable of assuming a position in the Medium strength category with a maximum lifting capacity of 50 pounds and a maximum carrying capacity of 25 pounds. (R. p. 363). Edwards was noted to have limitations with crawling on his hands and feet and with balancing activities that required crouching. Id.

On May 6, 2013, Dr. Loudermilk noted Edwards appeared to be at maximum medical improvement, and he referred him to Dr. Carol Burnette in his practice for an impairment evaluation. (R. pp. 278-279). He also reviewed the FCE report and opined that he would not be able to release Edwards back to full duty with no restrictions as a police officer given the results of his FCE. (R. p. 279). On June 17, 2013, Dr. Loudermilk assigned Edwards permanent restrictions per the FCE. (R. p. 280).

Edwards continued to work his light-duty position with the SCDPS through June of 2013. (R. p. 115, lines 5-15). He testified that he resigned from his position with the SCDPS and accepted state retirement disability after being assigned permanent restrictions. Id.

On July 2, 2013, Dr. Burnette performed an impairment evaluation on Edwards and opined he had sustained 25% whole person impairment, which she converted to a 32% lumbar spine impairment rating. (R. pp. 282-285). She also assigned permanent restrictions based on his FCE, and she opined Edwards may benefit from vocational retraining. (R. p. 285).

Edwards continued to receive ongoing pain management treatment with Dr. Loudermilk. While Dr. Loudermilk prescribed him a variety of different medications in an attempt to alleviate the ongoing pain in his right leg, Edwards was not interested in taking medications. (R. p. 235, lines 15-20). On June 4, 2014, Dr. Loudermilk noted Edwards "has had increased pain in his right leg over the past three to four weeks, but apparently he stopped taking Gralise because he does not like taking pills." (R. p. 294). A urine drug screen performed that day also showed Edwards had not taken any of his prescribed medications in at least 3 days. (R. pp. 279-281; R. p. 231, line 9-p.232, line 12). Dr. Loudermilk instructed him to restart Gralise, and he ordered an updated MRI to make sure

nothing had drastically changed. (R. p. 294). On July 18, 2014, Dr. Loudermilk reviewed the recent MRI and did not believe he was a surgical candidate. (R. p. 295). He also noted Edwards stopped taking Gralise and was complaining of cramping in his right leg and foot. Id. On November 3, 2014, Edwards reported he was having a lot of pain in his back and right leg. (R. p. 298). As a result, Dr. Loudermilk referred him back to Dr. Bucci. Id.

Prior to seeing Dr. Bucci, Edwards underwent a two day FCE at New Day Physical Therapy on November 20 & 21, 2014 at the request of his attorney. (R. pp. 346-359). Based on the results of the two day FCE, the therapist opined Edwards was capable of working an eight hour day at a sedentary work level position. (R. p. 347).

On December 30, 2014, Edwards presented to Dr. Bucci for a reevaluation. (R. pp. 377-378). Dr. Bucci reviewed the June 2014 MRI, diagnosed him with lumbar DDD and radiculopathy, and opined Edwards was not a surgical candidate. Id.

On March 8, 2015, Edwards's vocational expert, Robert E. Brabham, Ph.D., opined Edwards remained unable to return to any gainful employment at any level of physical activity given his present combination of conditions, limitations, and restrictions. (R. pp. 331-344).

James R. Myers, MA, QRP, CCM, CRC, (Respondents' vocational expert) performed a vocational evaluation on Edwards on May 8, 2015. (R. pp. 383-391). While Mr. Myers agreed with Dr. Loudermilk that Edwards could not perform his duties as a law enforcement officer, it was his opinion Edwards was employable and would have little difficulty qualifying for and transitioning into alternative employment options based on his assessment results, educational background, and previous vocational background. (R. p.

391). On May 11, 2015, Mr. Myers completed a labor market survey listing a sample of the jobs he believed Edwards could perform. (R. pp. 393-399).

At his deposition, Dr. Loudermilk testified that he believed Edwards looked for excuses not to take the medication because he did not like to be on medication. (R. p. 235, lines 15-17). Since Edwards did not like medications, Dr. Loudermilk recommended a SCS, which could allow him to eliminate the need for oral medications. (R. p. 222, lines 8-20). Dr. Loudermilk described Edwards as "an ideal candidate" for a SCS, and he believed a SCS would decrease Edwards's pain. (R. p. 237, line 21-p. 238, line 3). However, Edwards declined the recommended SCS. (R. p. 118, line 19-p.119, line 13).

STANDARD OF REVIEW

In workers' compensation cases, the Commission is the ultimate finder of fact. Hunter v. Patrick Const. Co., 289 S.C. 46, 47, 344 S.E.2d 613, 614 (1986); Ross v. American Red Cross, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989). The Appellate Court's review of these findings of fact is limited to determining whether the findings are supported by substantial evidence in the record. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Howell v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (1987). "Substantial evidence" necessary to support a decision of the Commission is:

'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . It must be enough to justify, if the trial were [sic] to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. . . . This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'

Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981); *see also*, O'Banner v. Westinghouse Electric Corp., 319 S.C. 24, 30, 459 S.E.2d 324, 327 (Ct. App. 1995) (The determination of witness credibility and the weight to be accorded evidence is reserved to the Commission.) The findings of the Commission are presumed correct and will be set aside only if unsupported by substantial evidence. Etheredge v. Monsanto Company, 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002); Medlin v. Upstate Plaster Serv., 329 S.C. 92, 495 S.E.2d 447 (1998).

The appellate court's review of the Commission's findings of fact is limited to determining whether the findings are clearly unsupported by substantial evidence in the record, rather than reweighing the evidence presented to the Commission. *See generally*, Lark v. Bi-

Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306-7 (1981); Howell v. Pacific Columbia Mills, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987); Brown v. Jordan Oil Co., 291 S.C. 272, 275, 353 S.E.2d 280, 282 (1987); O'Banner v. Westinghouse Elec. Corp., 319 S.C. 24, 30, 459 S.E.2d 324, 327 (Ct. App. 1995). The appellate court is prohibited from overturning findings of fact of the Commission, unless there is no reasonable probability that the facts could be as related by the witness upon whose testimony the finding was based. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). Thus, if reasonable minds could reach the conclusion reached by the Commission, the Commission's findings must be affirmed. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162, 163 (1992).

Of special note is that where the evidence is conflicting, "the Commission's findings of fact are conclusive." Sharpe v. Case Produce, Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999); *See also*, Hoxit v. Michelin Tire Corp., 304 S.C. 461, 405 S.E.2d 407 (1991) ("Where there is a conflict in the evidence, either of different witnesses or of the same witnesses, the findings of fact of the Commission as triers of fact are conclusive.") Indeed, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Tiller v. National Health Care Ctr., 334 S.C. 333, 513 S.E.2d 843 (1999); Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E.2d 856 (1998).

ARGUMENT

I.

THE COMMISSION CORRECTLY FOUND THAT EDWARDS IS NOT PERMANENTLY AND TOTALLY DISABLED AS A RESULT OF HIS JULY 16, 2012 WORK INJURY.

A claimant has the burden of proving the facts essential to his right to compensation. Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E.2d 646 (1967). In the present case, substantial evidence supports the Commission's finding that Edwards failed to meet his burden of proof that he is permanently and totally disabled as a result of his July 16, 2012 work accident. (*See R. p. 43*).

As noted above, following his July 16, 2012 work accident, Dr. Bucci performed a right L5-S1 laminectomy, facetectomy, foraminotomy, and discectomy on Edwards's lumbar spine on October 1, 2012. (*R. pp. 318-319*). While the surgery improved Edwards's lower back pain, he continued to have pain down his right leg. (*R. p. 273*). As a result, Dr. Bucci referred him to Dr. Loudermilk for pain management treatment. *Id.* Dr. Loudermilk's treatment included an injection, medications, and physical therapy. (*R. pp. 273-277*). Dr. Loudermilk also provided Edwards with option of a SCS; however, Edwards did not want to pursue a SCS. (*R. p. 277*). On April 1, 2013, Dr. Loudermilk recommended a few more weeks of physical therapy, followed by an FCE. *Id.*

On April 23, 2013, Edwards underwent an FCE at Doshier Physical Therapy Associates, which revealed he was capable of assuming a position in the Medium strength category with a maximum lifting capacity of 50 pounds and a maximum carrying capacity of 25 pounds. (*R. pp. 360-372*). Edwards was noted to have limitations with crawling on his hands and feet and with balancing activities that required crouching. *Id.*

On May 6, 2013, Dr. Loudermilk opined Edwards had reached MMI, and on June 17, 2013, he assigned Edwards the following permanent restrictions:

- No lifting greater than 50 pound occasionally, 25 pounds frequently, or 12 pounds constantly;
- No carrying greater than 25 pounds occasionally, 12 pounds frequently, or 5 pounds constantly;
- No pushing or pulling greater than 100 pounds;
- No crawling on his hands and feet; and
- No crouching on a narrow beam for up to 30 seconds.

(R. pp. 278 & 280). These restrictions were also confirmed by Dr. Burnette during her impairment evaluation on July 2, 2013. (R. p. 285). While Edwards wanted to return to a position in law enforcement, Dr. Loudermilk did not recommend it due to his restrictions. (R. p. 286).

Even though Edwards was not capable of returning to his job as a transport officer, the evidence establishes he can return to workforce in a different capacity. In fact, the light duty position Edwards worked for SCDPS following his surgery - but prior to the FCE - was well within Dr. Loudermilk's restrictions. On January 3, 2013, three months after his surgery, Dr. Bucci released him to return to light duty work with a 30 pound weight limit. (R. p. 376). SCDPS provided Edwards a position within his restrictions, and he returned to work on January 14, 2013. (R. p. 110, lines 8-10). While on light duty, Edwards worked at SCDPS's District Office in Greenville as an assistant to his supervisor. (R. p. 89, lines 1-10). His light duty job consisted of doing paperwork, reading inspections, watching videos, and filing tickets. Id. Edwards continued to work in this position for nearly six months. (See R. p. 115, lines 5-10). After being assigned permanent restrictions by Dr. Loudermilk, Edwards realized he was unable to return to his regular job as a law enforcement officer due

to the restrictions in his FCE. (R. p. 116, lines 21-24). As a result, on June 30, 2013, he resigned from his position and accepted state disability retirement.¹ (R. p. 115, lines 5-15).

Edwards described himself as being “Mr. Mom” since his employment with SCDPS ended. (R. p. 92, lines 6-8). Edwards lives with his wife and 3 year-old daughter. (R. p. 123, lines 1-4). He testified that his wife works, so he is responsible for taking care of and watching his daughter throughout the day. (R. p. 123, lines 5-7). Edwards also tries to keep up with chores around the house, including laundry and washing dishes. (R. p. 92, lines 20-p.93, line 14). Additionally, the main source of heat in his house, which is located on 3 plus acres of land, is a wood-burning stove and fireplace. (R. p. 124, line 17-p.125, line 3). Edwards testified that every weekend during the winters of 2013 and 2014, he used a chainsaw and a hydraulic wood splitter to cut firewood for his house. (R. p. 77, lines 4-17). Even though Edwards has not worked since resigning from the SCDPS in June of 2013, his activities since that time support the Commission’s finding that he is not permanently and totally disabled.

Edwards relies on the 2-day FCE he underwent at New Day Physical Therapy on November 20 & 21, 2014 at the request of his attorney to support his position that he is permanently and totally disabled. (See R. pp. 346-359). While Edwards’s capacities decreased between day one and day two of the FCE, the therapist opined: “Based on the findings of this two day function capacity evaluation Mr. Edwards is capable of working an eight hour day at a sedentary work level position.” (R. p. 347).

Even assuming arguendo that Edwards is restricted to sedentary duty, the evidence establishes he is capable of returning to the workforce.² In May of 2015, Respondents

¹ Edwards receives \$2,200 per month in state retirement disability benefits. (R. p. 115, lines 16-19).

retained James R. Myers to perform a vocational evaluation on Edwards.³ (R. pp. 383-391). Mr. Myers interviewed Edwards, reviewed his medical records and FCEs, and looked at other occupational guidelines and resources prior to issuing his opinions. (R. p. 166, line 19-p.167, line 21). In his report, dated May 8, 2015, Mr. Myers noted he agreed with Dr. Loudermilk that Edwards could not perform his duties as a law enforcement officer. (R. p. 391). However, it was his opinion that Edwards was employable and would have little difficulty qualifying for and transitioning into alternative employment options based on Edwards's assessment results, educational background, and previous vocational background. Id. Despite Edwards's restrictions, Defendants' vocational expert was able to find multiple *sedentary level* positions he could perform, including collection clerk, fraud investigator, desk officer, customer service representative, and surveillance system monitor. (R. pp. 389-390). Additionally, on May 11, 2015, Mr. Myers completed a labor market survey listing examples of available jobs he anticipated Edwards could perform. (R. pp. 393-399). At his deposition, Mr. Myers confirmed it was his opinion, to a reasonable degree of vocational certainty, that Edwards was capable of returning to the workforce. (R. p. 215, lines 13-17).

Edwards's age and his work history are also both positive factors in him returning to the workforce. (R. p. 210, line 22-p.211, line 7). Edwards is only 35 years old, and in addition to being a high school graduate, he is a graduate of the Criminal Justice Academy. (R. p. 101, lines 19-25; R. p. 102, lines 15-20). At the Academy, (R. p. 103, lines 8-21). He also obtained his DataMaster certification and received training to be a K-9 handler. (R. p.

² As previously mentioned, Edwards worked a sedentary position for the SCDPS for six months following his surgery.

³ James Myers is a vocational expert, certified case manager, certified rehabilitation counselor, and qualified rehabilitation professional who performs vocation evaluations for both insurance companies and plaintiff's attorneys. (Myers Depo. at 4).

77, lines 2-16). After completing the Academy, Edwards worked for the Pickens County Sheriff's Office for 5 years as a deputy sheriff. (R. p. 103, line 22-p.104, line 1). As a deputy sheriff with Pickens County, Edwards responded to calls, interviewed witnesses, took written statements, and completed incident reports and other paperwork. (R. p. 104, line 5-p.105, line 25). Edwards was hired by the SCDPS as a transport police officer in October 2007, and he held the position of senior officer at the time of his work accident. (R. p. 106, lines 17-25). His job duties required him to him to enforce State and Federal commercial trucking and vehicle laws, and he inspected vehicles, issued citations, prosecuted violators in Magistrate Courts, handled radio and phone calls, and completed paperwork on a computer. (R. p. 107, line 1-p. 108, line 4).

Furthermore, Edwards has the ability to learn additional skills. (See R. p. 213, line 22-p. 214, line 1). Edwards testified to having some computer knowledge, and he admitted he could learn how to do more on a computer if he had the opportunity. (R. p. 122, lines 6-25). Mr. Myers testified that given Edwards's ability to learn additional skills, he highly recommended, and advised Edwards, to attend vocational rehabilitation so he could receive training in other positions that are available and that he would qualify for. (R. p. 214, lines 2-11).

Finally, substantial evidence establishes that his pain would more likely than not be alleviated if he followed Dr. Loudermilk's treatment recommendations. Edwards's most limiting factor is the pain in his right leg. (R. p. 120, lines 2-4). Dr. Loudermilk has prescribed Edwards several different medication combinations in an attempt to reduce the pain in his leg. (R. p. 234, lines 1-5; R. p. 235, lines 18-20). Dr. Loudermilk's records indicate that when Edwards was actually taking medications on a regular basis, he was obtaining some

relief. (R. p. 235, lines 20-25; *See also* R. pp. 292-294). Yet, Edwards has refused to take medications on a regular basis.⁴

On November 11, 2013, Dr. Loudermilk switched his Neurotin to Gralise. (R. p. 289). On January 17, 2014, Dr. Loudermilk noted Edwards had not been taking Gralise at the appropriate time of day based on misinformation from his pharmacist, and he instructed him on the proper time to take it. (R. p. 291). Edwards returned to Dr. Loudermilk on February 14, 2014, and it was noted he was taking the medications correctly, was getting much better results, and was tolerating his medications without any side effects. (R. p. 292). On April 11, 2014, Edwards reported that he was pleased with his current medications and was tolerating them without any side effects. (R. p. 293). Dr. Loudermilk refilled his medications. Id. However, on June 4, 2014, Dr. Loudermilk noted Edwards “has had increased pain in his right leg over the past three to four weeks, but apparently he stopped taking Gralise because he does not like taking pills.” (R. p. 294). A urine drug screen performed that day also showed Edwards had not taken any of his prescribed medications in at least 3 days. (R. pp. 379-381; *See also* R. p. 231, line 9-p. 232, line 12). Dr. Loudermilk instructed him to restart Gralise. (R. p. 294). On July 18, 2014, Edwards returned for a follow up and complained of cramping in his right leg and foot, and Dr. Loudermilk noted Edwards again stopped taking Gralise. (R. p. 295).

When Dr. Loudermilk was questioned at his deposition about Edwards’s reasoning for not taking medications, he testified “I think a lot of times he looks for an excuse not to take the medications because he doesn’t like to be on medications.” (R. p. 235, lines 15-17). Since

⁴ At the hearing, Edwards’s medications included Ultracet and a neuropathic pain cream. However, he testified that he takes the Ultracet very sparingly and that he had only taken 2 or 3 pills in the week before the hearing. (R. p. 129, line 19-p.131, line 9).

Edwards was “not a medication person,” Dr. Loudermilk recommended a SCS, which could allow him to eliminate the need for oral medications. (*See* R. p. 294). At his deposition, Dr. Loudermilk testified Edwards is “an ideal candidate” for a SCS because of the nature of his symptoms:

First of all, the nature of his pain. The majority of his pain is from the buttock down to the foot, which makes him an ideal candidate for spinal cord stimulation. People that have a lot of back pain don’t always get the best results, but people that have leg pain get superior results. Secondly, his pain is 99 percent neuropathic, and spinal cord stimulation works great for nerve damage and nerve pain.

(R. p. 228, line 25-p. 229, line 7). Dr. Loudermilk further testified that based on his experience, the spinal cord stimulator would decrease Edwards’s pain complaints and would allow him to be able to do more activities. (R. p. 237, line 21-p. 238, line 6). However, despite the chances for success, Edwards declined the recommended SCS. (R. p. 119, lines 10-12).

Based on the foregoing, substantial evidence supports the Commission’s decision that Edwards failed to meet his burden of proof that he is permanently and totally disabled as a result of his July 16, 2012 work accident.

II

THE COMMISSION APPROPRIATELY FOUND THAT EDWARDS WAS NOT ENTITLED TO A LUMP SUM PAYMENT OF BENEFITS.

The Commission has the discretion to determine whether a lump sum award would be appropriate. *See* S.C. Code Ann. §42-9-301. The Court’s review of the Commission’s decisions concerning lump sum payments is under the abuse of discretion standard, rather than the substantial evidence standard. *See Swilling v. Pride Masonry of Gaffney*, 401 S.C.

178, 736 S.E.2d 672 (Ct. App. 2012). “An abuse of discretion occurs if the Commission’s findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law.” Thompson v. S.C. Steel Erectors, 369 S.C. 606, 632 S.E.2d 874 (Ct. App. 2006).

Under Section 42-9-301, the Commission “*may*” order a partial or total lump sum payment “when the employee so requests and the commission deems it not to be contrary to the best interest of the employee or his dependents, or when it will prevent undue hardship on the employer or his insurance carrier, without prejudicing the interest of the employee or his dependents.” S.C. Code Ann. §42-9-301. Additionally, Regulation 67-1605 provides, in part, that “[w]hen a settlement or award is more than one hundred weeks, the Hearing Commissioner *may* order a lump sum payment.” S.C. Code Ann. Reg. 67-1605 (Emphasis added). “In determining whether to award a lump sum payment to a claimant, the Commission must consider whether the award will cause a hardship to the employer or carrier and whether the payment would be in the best interest of the claimant and his family.” Swilling v. Pride Masonry of Gaffney, 401 S.C. 178, 736 S.E.2d 672 (Ct. App. 2012).

In the present case, while Edwards requested to receive his award in a lump sum, the Commission correctly concluded that ordering payment in a lump sum would be prejudicial to Defendants because there is a greater than usual chance of a change of condition for the better. Dr. Loudermilk testified Edwards is “an ideal candidate” for a SCS and that a SCS would likely improve his condition. (R. p. 228, line 21-p. 229, line 7; R. p. 237, line 21-p. 238, line 6). Thus, there is a significant chance Edwards’s disability will lessen if he decides to pursue the recommended SCS in the future. Notably, even though Edwards testified at

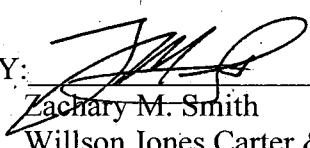
the hearing that he did not want to pursue the SCS, he confirmed he had a psychological evaluation scheduled to obtain clearance for a SCS trial. (R. p. 120, lines 12-18). Awarding Edwards a lump sum payment would place an undue hardship on Defendants because it would eliminate any possibility of Defendants seeking a change of condition for the better under S.C. Code Ann. §42-17-90 if Edwards pursues the SCS and if his condition does in fact improve.

Accordingly, Defendants contend that the Commission's finding that Edwards was not entitled to a lump sum payment of benefits should also be affirmed.

CONCLUSION

Based on the foregoing, Respondents South Carolina Department of Public Safety and State Accident Fund respectfully request that this Court affirm the Decision and Order to the South Carolina Workers' Compensation Commission in its entirety.

Respectfully submitted,

BY: 

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February 14, 2017

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SCWCC Case No. 1209393

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SC Court of Appeals

Matthew Edwards, Employee,

Appellant,

v.

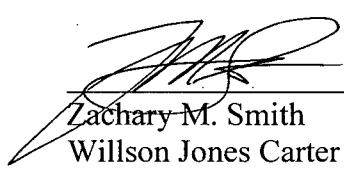
SC Department of Public Safety, Employer,
and State Accident Fund, Carrier,

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Respondents complies with Rule 211 (b), SCACR.

February 14, 2017


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