THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

RECEIVED
JAN 19 2016
SC 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.

FINAL BRIEF OF RESPONDENTS

L. Brenn Watson, Esquire
Willson Jones Carter & Baxley
872 S. Pleasantburg Drive
Greenville, South Carolina 29607
(864) 527-3292
Attorneys for Respondents

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.

FINAL BRIEF OF RESPONDENTS

L. Brenn Watson, Esquire
Willson Jones Carter & Baxley
872 S. Pleasantburg Drive
Greenville, South Carolina 29607
(864) 527-3292
Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 4

STANDARD OF REVIEW 8

ARGUMENTS 10

I. SUBSTANTIAL EVIDENCE SUPPORTS THE APPELLATE PANEL'S FINDING THAT APPELLANT IS NOT PERMANENTLY AND TOTALLY DISABLED. 10

II. THE APPELLATE PANEL PROPERLY LIMITED APPELLANT'S FUTURE MEDICAL TREATMENT AND FOUND THAT FUTURE SURGERY WOULD NOT AFFECT APPELLANT'S MMI STATUS 24

CONCLUSION 31

TABLE OF AUTHORITIES

Cases

Anderson v. Campbell Tile Co.,
202 S.C. 54, 24 S.E.2d 104 18

Brown v. R.L. Jordan Oil Co.,
291 S.C. 272, 353 S.E.2d 280 (1987) 8

Colvin v. E.I Du Pont De Nemours Co.,
227 S.C. 465 (1955) 8

Corbin v. Kohler Co.,
351 S.C. 613, 571 S.E.2d 92 (Ct.App.2002) 19

Etheredge v. Monsanto Co.,
349 S.C. at 455, 562 S.E.2d at 681 (Ct.App.2002) 8

Gadson v. Mikasa Corp.,
368 S.C. 214, 224, 628 S.E.2d 262, 268 (Ct.App.2006) 28

Hall v. United Rentals, Inc.,
371 S.C. 69, 636 S.E.2d 876 (Ct.App.2006) 26

Hargrove v. Titan Textile Co.,
360 S.C. at 294, 599 S.E.2d at 613 18

Hayne Federal Credit Union v. Bailey,
327 S.C. 242, 489 S.E.2d 472 (S.C., 1997) 27-28

Hendricks v. Pickens County,
335 S.C. 405, 517 S.E.2d 698 (Ct. App. 1999) 9

Howell v. Pacific Columbia Mills,
291 S.C. 469, 354 S.E.2d 384 (1987) 8

Hunter v. Patrick Construction Co.,
289 S.C. 46, 344 S.E.2d 613 (1986) 8

In re Crawford,
205 S.C. 72, 30 S.E.2d 841 18

Kilpatrick v. Brotherhood of Railroad Trainmen Insurance Department,
210 S.C. 379, 42 S.E.2d 891 18

Lark v. Bi-Lo, Inc.,
276 S.C. 130, 276 S.E.2d 304 (1981) 8

Long v. Atlantic Homes,
311 S.C. 237, 428 S.E.2d 711 (1993) 19

Lyles v. Quantum Chem. Co.,
315 at 445, 434 S.E.2d at 295 19

Poston v. Southeastern Construction Co.,
208 S.C. 35, 36 S.E.2d 858 18

Rodriguez v. Romero,
363 S.C. 80, 610 S.E.2d 488 (2005) 8-9

Parsons v. Georgetown Steel,
318 S.C. 63, 456 S.E.2d 366 (1995) 8

Shealy v. Aiken Cty.,
341 S.C. 448, 535 S.E.2d at 438 (2000) 8, 19

Sharpe v. Case Produce, Inc.,
336 S.C. 154, 519 S.E.2d 102 (1999) 8

Smith v. S.C. Dept. of Mental Health,
335 S.C. 396, 517 S.E.2d 694, rehearing denied (1999)...26

Tiller v. Nat'l Health Care Ctr. of Sumter,
334 S.C. at 340, 513 S.E.2d at 846 (1999)...18, 19

Wyndham v. City of Florence,
221 S.C. 350, 70 S.E.2d 553 (1952) 18

Statutes

S.C. Code Ann. Section 42-9-10 (2007)...2, 24

S.C. Code Ann. Section 42-15-60 (2007) 28-29

STATEMENT OF ISSUES ON APPEAL

I. DID THE SOUTH CAROLINA WORKERS' COMPENSTAION COMMISSION ERR IN FINDING APPELLANT IS NOT PERMANENTLY AND TOTALLY DISABLED?

II. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN LIMITING APPELLANT'S FUTURE MEDICAL TREATMENT AND FINDING THAT FUTURE SURGERY WOULD NOT CHANGE APPELLANT'S MMI STATUS?

STATEMENT OF THE CASE

Appellant sustained a compensable injury to her left knee in a work-related accident on February 19, 2009. Thereafter, she developed admitted overcompensation injuries to her right knee and low back. By previous Order of the Commission, dated February 14, 2013, Appellant was also found to have suffered an aggravation of her preexisting psychological condition due to the 2009 accident and associated injuries. Appellant filed a Form 50, Request for Hearing, on August 26, 2013, and a hearing was held before the Single Commissioner on March 12, 2014.

At the hearing, it was Appellant's position that she had reached maximum medical improvement (MMI) for the conditions related to the 2009 accident, and she alleged she is permanently and totally disabled on account of the same, pursuant to S.C. Code Ann. Section 42-9-10. Appellant argued that, despite being at MMI, she was entitled to future medical treatment, to include a seventh left knee surgery recommended by the authorized treating physician. ***Appellant argued the surgery would not affect her MMI status, and she submitted a questionnaire from the authorized treating surgeon supporting that argument***.

Respondents set forth alternative positions: (1) Appellant had either reached MMI, was not permanently and totally disabled, and was not entitled to further knee surgery; or, (2) Appellant had not reached MMI and was entitled to further knee surgery as recommend by the authorized treating physician.

By Decision and Order dated July 23, 2014, the Single Commissioner adopted Appellant's position that she had reached MMI. He assigned 40% permanent partial disability to her left knee, 2% permanent partial disability to her low back, and 0%

permanent partial disability to her right knee. The Single Commissioner found Appellant's psychological condition is not disabling. The Single Commissioner found Appellant is entitled to causally-related future medical treatment, and Respondents are entitled to a credit for overpayment of TTD paid beyond December 13, 2013. ***The Single Commissioner further found that Appellant is not credible.*** On July 28, 2014, Appellant filed a Form 30, Request for Commission Review, appealing the Order of the Single Commissioner to the Appellate Panel of the South Carolina Workers' Compensation Commission (hereafter, "the Appellate Panel"). Appellant unequivocally argued at the Single Commissioner hearing that she had reached MMI, despite her need for another left knee surgery. However, Appellant's Form 30 indicates the Commission erred by finding Appellant had reached MMI.

Briefs were filed by the parties, and oral arguments were held before the Appellate Panel on November 18, 2014. By Decision and Order dated March 4, 2015, the Appellate Panel affirmed the Order of the Single Commissioner in its entirety. Appellant timely filed a Notice of Appeal to this Court, and this appeal follows.

STATEMENT OF THE FACTS

Appellant first presented to Doctor's Care on February 21, 2009. The record from that date states: "Three episodes seemingly minor trauma, banged on desk, twisted and crouched for baseball practice. Now complains of left knee pain and swelling." (R. p. 519) Appellant then presented to her family physician, Dr. Faile, for evaluation on February 24, 2009. This narrative states: "Left knee pain. No trauma or injury. Bumped it a couple of times but other than that no trauma or injury." (R. pp. 376, 574) Appellant did not mention the "baseball" twisting incident to Dr. Faile. Dr. Faile referred Appellant for an MRI of the left knee, which was performed on March 5, 2009. The MRI showed a flap of articular cartilage with some degeneration. (R. pp. 374, 574)

Dr. Faile referred Appellant to Dr. Vann at Piedmont Orthopaedic Associates, where she was seen on March 16, 2009. (R. pp. 374, 449, 574) Dr. Vann reviewed the MRI and opined that it showed a chondral lesion. (R. p. 449) He performed arthroscopic surgery on April 20, 2009. (R. pp. 459-460) Appellant underwent two additional surgeries, performed by Dr. Vann on October 30, 2009 and August 9, 2010. (R. pp. 455-456, 451-452) He released her at MMI on September 20, 2010 with 7% impairment to her left knee. (R. pp. 413-414) He also opined that her degenerative changes were not enough to warrant a knee replacement unless her condition changed. (*Id.*)

Respondents initially questioned whether Appellant's left knee condition was causally-related to an alleged work injury. Appellant also complained of overcompensation pain in her right knee, and low back pain, which she attributed to overuse of crutches while recovering from her left knee surgeries. However, on January 12,

2011, the parties entered into a consent order, whereby Respondents agreed to accept liability for the left knee, right knee and back conditions. (R. pp. 1-3)

Appellant later alleged an aggravation of her preexisting psychological condition, which she attributed to the 2009 accident, and Respondents denied the same. After a hearing before Commissioner Andrea C. Roche, Appellant's psychological condition was found compensable, and Respondents assumed treatment for the same. (R. pp. 7-16)

Appellant was referred to Dr. Dana Piasecki for ongoing treatment of the left knee. Appellant first presented to Dr. Piasecki on August 30, 2011 for a second opinion and consideration for additional cartilage restoration options. (R. pp. 207-208) Dr. Piasecki recommended a left knee arthroscopy with staging evaluation, debridement, plica resection, and ACI biopsy, and he performed the same on September 26, 2011. (R. pp. 201-204)

At a follow-up appointment on November 1, 2011, Dr. Piasecki noted that Appellant "feels her knee is no better than it was prior to the surgery and, at this point, is interested in additional surgical options." (R. pp. 198-199) At that time, he recommended a left knee open autologous chondrocyte implantation medical femoral condyle, a high tibial osteotomy, and an iliac crest autograft, and he performed the same on December 12, 2011. (R. pp. 192-196)

Appellant continued to follow-up with Dr. Piasecki postoperatively, and she had continued complaints with regard to weightbearing and stiffness. On April 26, 2012, the doctor noted that he would favor a second look arthroscopic procedure if Appellant's problems persisted, and at her next appointment on May 24, 2012, he recommended a second look arthroscopy, debridement, and removal of her HTO hardware, which was performed on June 15, 2012. (R. pp. 171-172, 160-162)

At a follow-up visit on August 14, 2012, Appellant noted that, overall, she felt she was progressing, and she was not eager to have any additional surgeries. (R. pp. 150-151) On November 21, 2012, Dr. Piasecki indicated that Appellant had plateaued, and he placed her at MMI with a 25% permanent impairment rating. (R. pp. 140-145) Dr. Piasecki assigned work restrictions and indicated Appellant would require no future medical care for the left knee related to the work injury. (*Id.*)

Appellant eventually requested an updated evaluation with Dr. Piasecki for her left knee, and Respondents provided the same on September 11, 2013. (R. pp. 138-139) Dr. Piasecki ordered an updated MRI, and he noted the following with respect to the MRI: "Should things look reasonable...I would favor an injection. Should she have obvious fissuring or mechanical explanations for her symptoms and/or should she not respond to the injection and still be substantially limited, we could end up discussing a 2nd look arthroscopy and possible debridement." (*Id.*)

On September 26, 2013, Appellant underwent an updated MRI of the left knee, which revealed "mild degenerative changes." (R. p. 332) Appellant returned to Dr. Piasecki on October 2, 2013. (R. pp. 135-136) At that time, Appellant indicated she would prefer a seventh arthroscopic surgery over an injection, which Dr. Piasecki opined was "not unreasonable." (*Id.*)

On January 13, 2014, ***prior to performing the recommended seventh surgery***, Dr. Piasecki completed a questionnaire ***sent to him by Appellant's attorney***, whereby the doctor opined the following: (1) ***Appellant remains at MMI for the left knee***; (2) Appellant's 25% rating remains the same; (3) ***Appellant will require additional medical***

treatment for the left knee; and (4) the restrictions provided in Appellant's October 25, 2012, FCE remain an accurate description of her physical limitations. (R. p. 134)

Regarding Appellant's low back condition, Appellant treated with Dr. Jyoti Math at Upstate Medical Rehabilitation after she was determined not to be a surgical candidate by Dr. Philip Hodge, a neurosurgeon. On March 4, 2013, Dr. Math placed Appellant at MMI for the low back and assigned Appellant a 1% permanent impairment rating. (R. pp. 303-307)

Respondents authorized an IME for Appellant's low back and right knee with Dr. John Evans of Foothills Orthopaedics and Sports Medicine, and the same was performed on March 13, 2013. (R. pp. 523-530) Dr. Evans assigned Appellant 0% permanent impairment ratings for the back and right knee, and he opined that Appellant would require no additional medical treatment and no permanent work restrictions with regard to the low back and right knee. (*Id.*)

Respondents authorized Appellant's psychological treatment with Dr. David Tollison. On December 16, 2013, Dr. Tollison completed a questionnaire, placing Appellant at MMI with a 10% whole person impairment rating. (R. p. 210)

STANDARD OF REVIEW

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The appellate court's review of these findings of fact is limited to determining whether the findings are clearly unsupported 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). The appellate court is not permitted to re-weigh the evidence and to substitute its own findings of fact for those of the Commission. Brown v. Jordan Oil Co., 291 S.C. 272, 353 S.E.2d 280 (1987). The Court of Appeals cannot substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact. Shealy v. Aiken Cty., 341 S.C. 448, 535 S.E.2d at 438 (2000). The extent of an injured worker's disability is a question of fact for determination by the Commission. Colvin v. E.I Du Pont De Nemours Co., 227 S.C. 465 (1955).

The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Shealy, 341 S.C. 448, 535 S.E.2d 438 (2000); Parsons v. Georgetown Steel, 318 S.C. 63, 456 S.E.2d 366 (1995). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999). Where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive. Etheredge v. Monsanto Co., 349 S.C. at 455, 562 S.E.2d at 681 (Ct.App.2002). Thus, "review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law." Rodriguez v. Romero, 363 S.C. 80, 84, 610 S.E.2d

488, 490 (2005)(citing Hendricks v. Pickens County, 335 S.C. 405, 411, 517 S.E.2d 698, 701 (Ct. App. 1999)).

ARGUMENTS

I.

SUBSTANTIAL EVIDENCE SUPPORTS THE APPELLATE PANEL'S FINDING THAT APPELLANT IS NOT PERMANENTLY AND TOTALLY DISABLED.

There is substantial evidence in the record to support the Appellate Panel's finding that Appellant is not permanently and totally disabled. Summarily, the evidence in the record leads to the following conclusions: (a) Appellant is not credible; (b) the medical reports, FCE, and opinions of Appellant's doctors are based, at least in part, on Appellant's subjective complaints and testing results, which are unreliable; (c) the Appellate Panel properly found Appellant is not permanently and totally disabled based on the vocational opinion of Jan Westmoreland, *in addition to* the medical records, Appellant's education, and the evidence in the record as a whole; and (d) the vocational opinion of Jan Westmoreland alone represents substantial evidence to support the finding that Appellant is not permanently and totally disabled.

a) Appellant is not credible.

Appellant's credibility is the most important issue in this claim. The Appellate Panel properly found Appellant is not credible, as Appellant was not forthright during her testimony, and her appearance during the hearing was inconsistent with the reports of her providers. The Appellate Panel specifically noted the following:

> When we consider the record as whole, reviewing [Appellant's] responses and comments throughout the record and in her testimony at the hearing, we find her subjective complaints to be inconsistent with the medical evidence and her actions at the hearing as observed by the Single Commissioner. ***As such, we find that [Appellant] is not credible.***

(R. p. 76, emphasis added)

In the Appellate Panel's 75 Findings of Fact, the Appellate Panel explicitly noted the following discrepancies and inaccuracies, all of which portray Appellant's lack of credibility and obvious desire to embellish her workers' compensation claim for the purpose of secondary gain:

- In Appellant's Pain Patient Profile Report dated October 8, 2013, there is this statement: "The P-3 Validity Index is designed to assess the probability of random responding, poor reading skills, and the excessive use of magnification in describing psychological and physical symptoms. This patient's extreme score (12) on the Validity index is higher than the scores of 95% of the pain patients in the normative sample. Because of this extreme score, ***the report is invalid***." The report further notes: "The clinician should consider investigating the possibility of random responding or poor reading skills. The P-3 is written at approximately an ***8th grade reading level.*** If the patient's response pattern and reading comprehension are acceptable, her Validity index score ***may suggest response magnification***." (R. pp. 68, 223-226, all emphasis added) ***Appellant has a Master's degree, despite testing at an 8th grade reading level.***
- In the medical notes from Dr. David C. Jacobs of the South Carolina Research Group, on a scale of "0" for no impairment, "1" very mild impairment, "3" moderate impairment, "4" severe impairment, "5" very severe impairment, Dr. Jacobs rarely rates Appellant above a "3" in any category, and in his last note included in the APAs (dated November 18, 2013), under "Interval History Change," he rates Appellant a "2" in four categories, a "1" in only one category, and a "0" in five categories. She received no ratings higher than a "2." Under "Examination," he rates her a "2" in only two of the fifteen categories, a "1" in only one category, and a "0" - no impairment - in twelve of the fifteen categories. The examination section concludes with these words, "Mood down some. No eye contact. ***Somewhat manipulative***." (R. pp. 68-69, 253-254, emphasis added)
- When questioned, Appellant provided detailed and complete answers to questions that could be perceived to be helpful to her case. However, when the question could have been perceived to not be helpful, her responses were labored and she often said she could not remember. (R. p. 71)
- An example of Appellant's opportunistic answers to questions during the hearing pertains to her prior medical treatment. (R. p. 71)
- Appellant presented to her family physician on January 14, 2004, where the physician noted Appellant "has got some arthritic tests pending" and she was referred to an orthopedist for questionable arthritis. When asked about this visit at the hearing, Appellant testified she did not remember the visit. (R. pp. 71, 586, and p. 819, lines 14-23)
- Appellant presented to her family physician on May 18, 2004, where she

complained of swelling in her legs, left worse than right, and the doctor noted Appellant's "left leg measures 44cm 10cm below the inferior patella and the right measures 42.75cm." The note also indicates Appellant complained of discomfort in her left knee, calf and thigh. When asked about this visit at the hearing, Appellant testified she did not recall having issues with her left knee in May of 2004. (R. pp. 73, 585, and p. 819 line 25 – p. 820, line 13)

- Appellant presented to her family physician on January 25, 2006, with complaints of bilateral knee and leg pain. When asked about this visit at the hearing, Appellant testified she did not recall having bilateral knee and leg pain in January 2006. (R. pp. 72, 580, and p. 820, lines 14-19)
- Appellant presented to Doctors Care on December 31, 2007, less than 14 months before he accident, and she complained of left knee pain. When asked about this visit at the hearing, Appellant testified she did not recall the visit. (R. pp. 72, 566, and p. 820, line 20 – p. 821, line 14)
- Appellant presented to Dr. Brian Burnikel on January 20, 2011, in relation to her work-related left knee injury. Dr. Burnikel's note states: "Gait: Normal ... Range of Motion: full AROM." At the hearing, Appellant reviewed the report of Dr. Burnikel indicating Appellant's gait was normal, and she testified, "It's not true." When asked about Dr. Burnikel's report that she had full active range of motion, Appellant also said this report was not true. (R. pp. 72, 406-407, and p. 828, line 18 – p. 829, line 20)
- Dr. Piasecki's November 21, 2012 report indicates Appellant was having "no back pain." When asked about this report during the hearing, Appellant testified Dr. Piasecki did not ask her whether she was having back pain at that time. (R. pp. 72, 142, and p. 840, lines 8-13)
- At the hearing, Appellant testified she tells the doctor her medications make her sleepy and drowsy at every visit. (R. p. 72, and p. 843, line 21 – p. 844, line 5)
- However, Dr. Math's record from July 21, 2011 indicates Appellant responded, "No," to the following questions: (1) "Does your current medication impair your judgment, coordination or your ability to drive?" (2) "Are you experiencing any side effects from the medications prescribed by your physician at UMR?" When asked about Dr. Math's July 21, 2011, report during the hearing, Appellant testified Dr. Math has never asked her whether her medications impair her judgment, coordination or ability to drive. (R. pp. 73, 321, and p. 843, line 10 – p. 844, line 1)
- Dr. Math's October 8, 2012, record again indicates Appellant answered, "No," to the two questions above regarding her medications. (R. pp. 73, 311)
- Dr. Math's October 8, 2012, record also indicates Appellant "is able to transfer independently. Her gait is normal." Appellant was shown the October 8, 2012 record from Dr. Math, indicating her gait was normal, and Appellant testified: "I will say this, all these doctors that are saying my gait is normal, I limp wherever I go. There are some days I limp more than others. But she – when I see her, I'm in the room. She leaves. I leave. I don't know if they're watching me when I walk in

or out, but my gait has not been normal for a long time." (R. pp. 73, 311, and p. 844, lines 6-17)

- Appellant was shown the record from Dr. Sanchez indicating a score of "0" for concentration, meaning there was no impairment, and she testified: "I see that, but he never talked to me about any of that." (R. pp. 73, 263, and p. 847, lines 18-23)
- Appellant was shown the record from Dr. Jacobs indicating a "0" for concentration, meaning there was no impairment, and she testified: "I didn't know that. I didn't know that. He didn't ask and I didn't know." (R. pp. 73, 257, and p. 848, line 22 – p. 849, line 6)
- Appellant was asked about the patient pain profile and validity test referenced above, and she testified: "I took the test. I answered the questions the way I felt at that moment." (R. pp. 73, 223-226, and p. 849, line 7 – p. 850, line 14)
- On May 10, 2009, Appellant was involved in an incident at Copper River Grill Restaurant when she apparently slipped on water on the floor and fell down. Appellant initially testified she received no money in settlement from that incident. However, she then testified, "they might have sent a check for $1,000.00." Appellant testified she may have received a small settlement from Copper River Grill, but she could not recall. (R. pp. 74, 689, and p. 825, line 16 – p. 827, line 9)
- Appellant was involved in a motor vehicle accident on March 18, 2011, when she was rear-ended and injured her neck. Appellant was diagnosed with cervicalgia, chest pain and pain in her right elbow and wrist, and she underwent physical therapy. Although Appellant testified she only wanted medical treatment, on September 13, 2011, Appellant sent a letter to State Farm Insurance demanding $15,000 to settle her case because she had experienced "tremendous pain and suffering." Appellant received a settlement from State Farm Insurance in the amount of $7,791. (R. pp. 74, 621-673)
- Appellant was involved in another motor vehicle accident on August 15, 2013, when she was rear-ended and injured her neck and experienced tingling down her right arm. Appellant received a settlement in the amount of $7,200 from State Farm Insurance in relation to the accident. (R. pp. 74, 606-620)
- Appellant filed a claim with the Equal Employment Opportunity Commission (EEOC) in May of 2013, and at that time, she believed she could work within her restrictions. (R. pp. 74, 674-688, and p. 855, line 11 – p. 858, line 17)
- Despite Appellant's filing a claim with the EEOC in May of 2013, and admitting at the hearing that she believed she could work as of May 2013, Appellant now asserts she is permanently and totally disabled from ever working again. The Commission indicated they found much of Appellant's testimony and actions to be self-serving and opportunity-based. (R. p. 74)

Based on all of the above, the Appellate Panel properly found Appellant is not credible, and this lack of credibility forms the framework for the Appellate Panel's finding

that Appellant is not permanently and totally disabled.

b) <u>The medical reports, FCE, and opinions of Appellant's doctors are based, at least in part, on Appellant's subjective complaints and testing results, which are unreliable.</u>

Because Appellant is not credible, 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. Of key importance in this case is the FCE report *obtained by Appellant*, which subsequently became part of the basis for work restrictions assigned by Appellant's physicians. (R. pp. 340-351) This report is unreliable for a multitude of reasons.

Firstly, the FCE was completed prior to Appellant reaching MMI, and it was obtained with the obvious motive of creating a permanent and total disability claim. The FCE report was destined to be unreliable before it was even completed. Appellant submits in her Brief that (1) "the FCE had been recommended by Dr. Piasecki on September 18, 2012," and (2) "[Respondents]...refused to pay for the FCE." Therefore, Appellant contends that she "paid for the FCE herself." (Appellant's Brief, p. 8, FN#2) ***This statement is untrue, it misstates Dr. Piasecki's September 28,2012 record, and it mischaracterizes the appropriate inaction of Respondents as a refusal to pay for a recommended evaluation***. When Appellant saw Dr. Piasecki on September 18, 2012, Dr. Piasecki noted the following:

> ***...she is comfortable with proceeding with therapy and I have given her a prescription for this. I have asked her to see me back in another 3 months*** for recheck essentially six months out from her chondroplasty, removal of hardware, and proximal tibial bone grafting in what I believe would be maximum medical improvement for her recent surgery. ***Should she be substantially limited at that point with, again, localizing mechanical complaints medially. We could potentially discuss revision of her ACI to an osteochondral allograft though if her symptoms are***

> ***more diffuse and/or similarly or less limiting, I would favor a probable functional capacity evaluation***. Follow up as noted.

(R. pp. 147-148, all emphasis added)

Appellant's assertion that an FCE had been recommended by Dr. Piasecki on September 18, 2012, and that Respondents refused to authorize an FCE, is simply not true. What ***actually occurred***, is that Appellant's attorney went ahead and referred Appellant for an FCE ***prior to Appellant reaching MMI***, and ***prior to an FCE being recommended by Dr. Piasecki***, in an obvious attempt to improperly direct Appellant's treatment and create a claim for permanent and total disability. On the FCE report, the "Referral Source" is listed as "Martin & Martin Attorneys, P.A.;" not Dr. Piasecki. (R. p. 344) Furthermore, at the Single Commissioner Hearing, Appellant specifically testified that she was referred for the FCE by her attorney, that she attended the FCE prior to reaching MMI, and that she was simply doing what she was instructed to do by her attorney.[1] (R. p. 834, line 23 – p. 835, line 17) The FCE report, obtained prior to Appellant reaching MMI (i.e., before her condition had stopped improving), and obtained by Appellant's attorney with the obvious motive of inflating Appellant's disability, cannot be relied upon as an accurate gauge of Appellant's restrictions.

Secondly, the FCE was based largely on Appellant's subjective effort and complaints, and because Appellant is not credible, the FCE is even more unreliable. Jan Westmoreland, a vocational expert, testified during her deposition that FCEs are based in large part on the subjective complaints of a patient, and if those subjective complaints are inaccurate, that would also make the assigned work restrictions inaccurate. (R. p. 759, line

[1] Appellant also testified that she was referred for a vocational evaluation by her attorney *prior* to reaching MMI, and when asked why she was seeking a vocational opinion prior to reaching MMI, she again testified she was "following instructions." (R. p. 838, line 15 – p. 839, line 9)

22 – p. 760, line 3) Similarly, the Appellate Panel properly noted the following with respect to the FCE in the record:

> This evaluation was conducted at the request of [Appellant's] counsel. This evaluation and the evaluator's conclusions are especially important in this case given that subsequent medical opinions offered by two of the authorized treating physicians in this case are based, at least in part, on this evaluation. (R. pp. 69-70)
>
> The use of an FCE as a reliable measure of an individual's functional abilities is dependent on the effort put forth by the individual. (R. p. 70)

The Appellate Panel noted that the Single Commissioner found inconsistencies with what the FCE evaluator observed during the FCE and what the Single Commissioner witnessed at the hearing, and the Appellate Panel found no reason to disturb this finding, as the Single Commissioner was in the best position to witness Appellant's behavior at the March 12, 2014 hearing. (R. p. 70) The Appellate Panel found Appellant's actions and demeanor to be inconsistent with the FCE report, and accordingly, the Panel afforded the report less weight.

The Appellate Panel also cited specific "notations in the FCE report which lead us to question the validity of [Appellant's] effort during the testing." (R. p. 70) The Appellate Panel noted the following discrepancies in the FCE report itself:

- In Table I of the FCE report, outlining Appellant's testing on carrying, pushing and pulling, Appellant's scoring was "***Incomplete***" on all seven tests. (R. pp. 70, 347, emphasis added)
- In Table II of the report, as to sitting, Appellant's tested ability is "occasional." (R. p. 347) In her summary, the evaluator notes, "Sitting was performed but the evaluee had to perform intermittent weight shifting during seated tasks." (R. pp. 70, 351)
- During the two hour and forty-two minute hearing, the Single Commissioner observed that Appellant was engaged and participated in the entire hearing. He found she did not appear to be in a great deal of physical distress. According to the Single Commissioner, Appellant only stood three times during the hearing and for less than one minute each time. In her

Initial Brief, Appellant erroneously refers to this as "sit and squirm" jurisprudence, but in reality, it is merely the Single Commissioner observing discrepancies between Appellant's alleged disability and performance during her FCE, and the Single Commissioner's own observations of the Appellant. (R. p. 70)

- In Table III of the report, testing rapid exchange, reach, overhead reach, and stair climbing, ***Appellant's testing was noted to be unreliable on all five tests***. (R. pp. 71, 348)
- In Table IV of the report, testing stooping, kneeling, squatting and climbing stairs, Appellant's scoring was "***Incomplete***" on all four tests. (R. pp. 71, 348, emphasis added)
- In Table VI of the report, testing Appellant's hands on a pegboard, Appellant tested in the 1st percentile in four of five tests, and she tested in the 5th percentile in the other test. The pegboard test measures an individual's hand, finger and arm dexterity. (R. pp. 71, 349) ***Notably, Appellant's hands, fingers, and arms were not affected by her work accident, so it is evident that the FCE was not only influenced by Appellant's poor effort, but it was also influenced by problems / body parts which are unrelated to the workers' compensation claim.***
- In Table VIII of the report, comparing rapid exchange force with standard position force, Appellant's rapid exchange force was greater than her standard position force bilaterally. The evaluator's report notes: "This table contains information that demonstrates the reliability of effort in the standard grip test. If [rapid exchange grip] strength exceeds standard grip strength it denotes ***probable unreliable or sub maximal effort*** in the standard test, which is indicated here..." (R. pp. 71, 349, emphasis added)

When the inconsistencies and discrepancies of the FCE report are viewed in conjunction with the additional credibility evidence outlined in section "a" above, it is clear that the FCE is not reliable, and that the work restrictions assigned by the doctors relying on that FCE are unreliable as well. Accordingly, the Appellate Panel properly noted:

> When we look at the opinions formed by the evaluators - vocational and functional - their conclusions, in part, rest on the effort and subjective complaints of [Appellant]. Likewise, the authorized treating physicians in this case base their opinions, at least in part, on the subjective complaints of [Appellant]. (R. p. 75)

> With such a [credibility] finding, given that many of the medical opinions are dependent on the subjective complaints of [Appellant], those conclusions must be viewed in a questionable light as well. (R. p. 76)

The outcome of this case rests on Appellant's lack of credibility, and on the lack of reliability of much of the evidence in the record resulting from Appellant's lack of credibility.

"No fact finding body is compelled to blindly accept an expert's opinion. While there may be circumstances where medical testimony is conclusive, ordinarily such opinions, although uncontradicted, are not conclusive in the sense that they must be accepted as true. They may be rejected if found inconsistent with the facts or otherwise unreasonable." Wyndham v. City of Florence, 221 S.C. 350, 359, 70 S.E.2d 553, 556 (1952); citing Anderson v. Campbell Tile Co., 202 S.C. 54, 24 S.E.2d 104; In re Crawford, 205 S.C. 72, 30 S.E.2d 841; Poston v. Southeastern Construction Co., 208 S.C. 35, 36 S.E.2d 858; Kilpatrick v. Brotherhood of Railroad Trainmen Insurance Department, 210 S.C. 379, 42 S.E.2d 891. Similarly, the Commission determines the weight and credit to be given to the expert testimony. Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. at 340, 513 S.E.2d at 846 (1999). Once admitted, expert testimony is to be considered just like any other testimony. Tiller, 334 S.C. at 340, 513 S.E.2d at 846. Although medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record. Hargrove v. Titan Textile Co., 360 S.C. at 294, 599 S.E.2d at 613; *see* Tiller, 334 S.C. at 340, 513 S.E.2d at 846 (confirming that medical testimony should not be held conclusive irrespective of other evidence). Appellant demands that the conclusion of the FCE be blindly accepted without analyzing the evidence which led to that conclusion. If this standard were employed, there would be no need for a court system.

Once it was determined by the Appellate Panel that Appellant is not credible, the Appellate Panel properly reviewed the medical opinions in the record and determined the weight and credit to be given to each expert's opinion, arriving at the conclusion that the opinion of Jan Westmoreland should be afforded greater weight in light of the evidence in the record as a whole. There is no legal error in this analysis, and instead, there is substantial evidence to support the Appellate Panel's findings.

c) **The Appellate Panel properly found Appellant is not permanently and totally disabled based on the vocational opinion of Jan Westmoreland, *in addition to* the medical records, Appellant's education, and the evidence in the record as a whole.**

After determining that Appellant is not credible, the Appellate Panel properly weighed *all of the evidence* in the record and determined that Appellant is not permanently and totally disabled. Appellant argues that the FCE and work restrictions assigned by Drs. Math and Piasecki would not allow Appellant to return to work. However, the Appellate Panel is not bound by the opinion of medical experts and "may find a degree of disability different from that suggested by expert testimony." Lyles v. Quantum Chem. Co., 315 at 445, 434 S.E.2d at 295. Expert medical testimony is merely intended to aid the Appellate Panel in coming to the correct conclusion. Corbin v. Kohler Co., 351 S.C. 613, 624, 571 S.E.2d 92, 98 (Ct.App.2002) (citing Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 513 S.E.2d 843 (1999)). As to the extent of disability, "it is not for this court to balance objective against subjective findings of medical witnesses, or to weigh the testimony of one witness against that of another. That is the function of the Commission alone." Long v. Atlantic Homes, 311 S.C. 237, 428 S.E.2d 711 (1993). The Court of Appeals may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact. Shealy, 341 S.C. at 455, 535 S.E.2d at 442.

As outlined above, the FCE and restrictions assigned by the doctors were found to be questionable by the Appellate Panel in light of Appellant's obvious lack of credibility, and the Appellate Panel was not bound by those medical opinions or reports, as there was substantial evidence in the record to support the conclusion that Appellant is not permanently and totally disabled.

Specifically, (1) the expert vocational opinion of Jan Westmoreland supports the Appellate Panel's finding (see detailed discussion in Section "d" below); (2) Appellant has a high school diploma, a bachelor's degree, and a master's degree, and the Appellate Panel specifically noted that Appellant's education formed part of the basis for their finding that Appellant is not permanently and totally disabled; (3) Dr. Math, in reference to the FCE, specifically noted: "spoke with therapist performing test who felt as though the pt. ... would likely be able to do more if she went through a formal work hardening program," (R. p. 294); and (4) Appellant filed a claim with the EEOC in May of 2013, and she testified at the hearing before the Single Commissioner that she believed she could work at the time she filed her EEOC claim. There is substantial evidence in the record to support the Appellate Panel's finding that Appellant is not permanently and totally disabled, including the deposition testimony of Jan Westmoreland, which Appellant has misclassified in her Initial Brief.

d) <u>The vocational opinion of Jan Westmoreland alone represents substantial evidence to support the finding that Appellant is not permanently and totally disabled.</u>

Appellant asserts it was erroneous for the Commission to rely on the opinion of Jan Westmoreland, citing a brief excerpt from Ms. Westmoreland's deposition testimony. However, Appellant's Initial Brief does not accurately or completely portray Ms.

Westmoreland's testimony and opinions. Ms. Westmoreland performed a vocational evaluation of Appellant on February 4, 2014, and she was deposed by Counsel for the respective parties on February 10, 2014. (R. pp. 732-743, 744-786)

Upon initial questioning by Appellant's Counsel during her deposition, Ms. Westmoreland testified that *if* the restrictions placed by the treating physicians were followed explicitly, there would be no jobs available for Appellant. However, further reading of Ms. Westmoreland's deposition testimony makes clear that the Commission properly relied on Ms. Westmoreland's opinion, in addition to the remainder of the evidence in the record, in finding Appellant is not permanently and totally disabled.

Ms. Westmoreland testified that, in evaluating an individual and forming a vocational opinion, she does not simply look at the restrictions from doctors, but she also bases her opinion on her interaction with the individual. (R. p. 750, lines 11-20) Ms. Westmoreland testified that she found that Appellant is capable of sedentary work. (R. p. 749, lines 15-18) Ms. Westmoreland testified that the FCE relied on by Dr. Piasecki and Dr. Math as a basis for the assigned work restrictions was completed nearly a year and a half before Ms. Westmoreland's deposition, and the FCE was obtained at the referral of Appellant's lawyer, rather than the referral of any of Appellant's doctors. (R. p. 755, line 21 – p. 757, line 16) Ms. Westmoreland testified that, if the results of Appellant's FCE are inaccurate, that would make the opinions of Dr. Piasecki and Dr. Math inaccurate as well. (R. p. 757, line 17 – p. 758, line 3)

Ms. Westmoreland testified that she is familiar with FCEs and reviews them often in her role as a vocational evaluator, and there are portions of FCEs which are subjective rather than objective. (R. p. 758, line 4 – p. 759, line 15) Ms. Westmoreland testified that

FCEs are based in large part on subjective complaints of a patient, and if those subjective complaints are inaccurate, that would also make the assigned work restrictions inaccurate. (R. p. 759, line 22 – p. 760, line 3)

Ms. Westmoreland testified she would expect someone with sub-sedentary capability (the capability level found by Appellant's FCE) to basically sit in a recliner or lay down most of the day. (R. p. 760, line 4 – p. 761, line 12) She testified that, if a person can do more than sit in a recliner and lay down most of the day, her opinion would be that the individual's functional abilities exceed sub-sedentary capability. (*Id.*)

Ms. Westmoreland testified that, when she completed her vocational report of Appellant, Ms. Westmoreland was operating under the assumption that the sub-sedentary classification assigned by the October 2012 FCE represented ***a floor*** for Appellant's capabilities, ***not a ceiling***. (R. p. 761, lines 13-17) Ms. Westmoreland testified that Appellant was forty-five (45) years old at the time of her vocational evaluation, and that age is not an impediment to Appellant returning to work. (R. p. 762, lines 19-24) Ms. Westmoreland testified that Appellant reported to her that she supervised eighteen (18) other employees in her job for the Respondent-Employer, which represents a reasonably high level of executive function, requires some degree of intelligence, and requires some degree of skill. (R. p. 768, line 25 – p. 769, line 20)

Ms. Westmoreland testified she has encountered other individuals with greater restrictions than those assigned by the October 2012 FCE who are able to work and who *are* working, and she testified a lot of that depends on the given patient's motivation to work. (R. p. 771, lines 7-18) Ms. Westmoreland further testified: "In my opinion, [Appellant] is content with what she's doing right now," which consists of "staying home,

going to the gym," and collecting a temporary disability check. (R. p. 771, line 19 – p. 772, line 9)

Ms. Westmoreland testified to a reasonable degree of vocational certainty (most probably true) that she believes Appellant can perform the jobs listed in her vocational report, as Appellant has the education, the work experience, the intellect, the functioning, and the physical ability to perform those jobs. (R. p. 773, line 18 – p. 774, line 11) Ms. Westmoreland further testified that she stands by her opinion that Appellant remains employable to a reasonable degree of vocational certainty. (R. p. 774, line 12 – p. 775, line 2)

The expert report of Jan Westmoreland finding that Appellant remains employable represents substantial evidence to support the Appellate Panel's finding that Appellant is not permanently and totally disabled, especially when viewed in conjunction with the obvious credibility issues in the claim. It is the job of the Appellate Panel to determine the weight to be afforded to each expert's opinion, and the Appellate Panel properly weighed the evidence and found Appellant is not permanently and totally disabled. The vocational evaluation obtained by Appellant's attorney and completed by Rock Weldon was completed ***prior to Appellant reaching MMI*** in an obvious attempt to prematurely posture the claim for a finding of permanent and total disability, and the Appellate Panel properly reviewed the opinions of both vocational experts and afforded greater weight to the opinion of Jan Westmoreland.

II.

THE APPELLATE PANEL PROPERLY LIMITED APPELLANT'S FUTURE MEDICAL TREATMENT AND FOUND THAT FUTURE SURGERY WOULD NOT AFFECT APPELLANT'S MMI STATUS.

At the hearing before the Single Commissioner, Appellant specifically argued that she was at MMI and that future surgery would not affect her MMI status. Leading up to the hearing, Appellant argued, either expressly or impliedly, that she had reached MMI:

1. Appellant's Form 50, Request for Hearing, specifically alleged she was permanently and totally disabled (which must follow a finding of MMI). (R. p. 107)

2. Appellant's Form 58, Pre-hearing Brief, specifically alleged she was permanently and totally disabled, "per 42-9-10." (Again, permanent disability follows MMI) (R. pp. 121-124)

3. Appellant's Pre-hearing Brief further stated: "She has been placed at MMI by the authorized treating knee surgeon, authorized treating pain management doctor treating her back, and authorized treating psychologist...[Appellant] seeks an award of Permanent and Total Disability." (R. p. 123)

4. Appellant's Pre-hearing brief further stated: "The authorized knee surgeon has recommended another arthroscopic procedure. ***However, it is that same doctor's opinion that [Appellant] remains at MMI. [Appellant] will most likely need treatment and possible arthroscopic procedures to her left knee for the remainder of her life...Moreover, [Respondents']authorized surgeon has stated to a reasonable degree of medical certainty that despite her need for the left knee procedure, she remains at MMI.***" (R. p. 123, emphasis added)

Similarly, in Appellant's attorney's opening statements at the Single Commissioner hearing, he stated: "**It's our position that she is at maximum medical improvement**, and that she is totally and permanently disabled, and we would like an award for that today." (R. p. 792, lines 19-22, emphasis added)

Just as she had argued in her Form 50, in her Pre-hearing Brief, and in her attorney's opening statement, Appellant testified during direct examination at the Single

Commissioner hearing that she understood the additional surgery being recommended to be maintenance treatment:

> Q: Is it your understanding that you've been placed at maximum medical improvement by Dr. Piasecki?
>
> A: Yes. (R. p. 802, lines 6-8)
>
> Q: Is it your understanding that another surgery will improve your knee and help you get better?
>
> A: No.
>
> Q: What's your understanding?
>
> (Objection to question overruled)
>
> A: It's not going to get better. But the surgeries that I need is going to help it – help me maintain the level of pain that I'm now so that it won't get any worse. It won't digress. But – but healing is not an option. Just to keep me functional, I guess is a good way to put it. I don't know.
>
> Q: Is it your understanding or what do you know about whether or not you will need any more surgeries?
>
> A: It's my understanding I will need surgery for the rest of my life.
>
> Q: So this number seven that's being recommended won't be the last one?
>
> A: No. (R. p. 809, line 18 – p. 810, line 18)

At the hearing before the Single Commissioner, Appellant's testimony was tailored to support her contention that she had reached MMI, and that any future surgeries she required, *specifically including the seventh surgery being recommended by Dr. Piasecki*, would merely be maintenance treatment and would not affect her MMI status. In fact, she even testified she would likely require additional surgeries for the rest of her life, and she submitted a questionnaire into evidence signed by Dr. Piasecki specifically opining that Appellant remained at MMI, despite the ongoing surgical recommendation.

After Appellant was not found permanently and totally disabled by the Single Commissioner, Appellant reversed course on her arguments. On appeal to the Appellate Panel, Appellant alleged "it is impossible to find [Appellant's] MMI status will not be affected by surgery before the surgery occurs...Until the [Appellant] has reached maximum healing following surgery, she will not be at MMI." (R. p. 706) This argument, and Appellant's current argument that the future surgery must affect her MMI status, are in direct contravention with her argument to the Single Commissioner, whereby Appellant insisted she was at MMI and the seventh surgery being recommended was merely future/maintenance treatment.

It was certainly not error for the Appellate Panel to find that Appellant had reached MMI, and that the surgery recommended by Dr. Piasecki was maintenance treatment which would not affect her MMI status, the very findings Appellant argued in favor of to the Single Commissioner.

In support of her current argument, Appellant argues she cannot be at MMI *and* entitled to the seventh surgery because she would be entitled to temporary disability benefits for times she is written out of work following future surgeries. However, it is elementary that Appellant is no longer entitled to *temporary* disability benefits after she has reached MMI. After MMI, Appellant is *permanently* disabled, and her entitlement to temporary disability benefits ceases. Smith v. S.C. Dept. of Mental Health, 335 S.C. 396, 517 S.E.2d 694, rehearing denied (1999). The Appellate Panel may order future treatment after the date of MMI to maintain a claimant's degree of physical impairment, and that is what the Appellate Panel has done in this case. Hall v. United Rentals, Inc., 371 S.C. 69, 636 S.E.2d 876 (Ct.App.2006). Appellant wants to "have her cake, and eat

it, too." She vehemently argued that she was at MMI and that any future surgeries would not affect her MMI status to the Single Commissioner. Now that she is unhappy with the extent of permanent disability awarded to her, she has entirely reversed course.

The Appellate Panel properly found that the future surgery would not affect Appellant's MMI status. However, even if Appellant had a valid argument to the contrary, Appellant is estopped from taking this position under the doctrine of Judicial Estoppel. The doctrine of Judicial Estoppel was adopted by the South Carolina courts in the case of Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (S.C., 1997), and it bars Appellant from arguing that the Appellate Panel erred in finding that future surgery would not affect Appellant's MMI status. In that case, the Supreme Court of South Carolina stated the following:

> Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation. *See* Colleton Reg. Hosp. v. MRS Med. Rev. Systs., 866 F.Supp. 896 (D.S.C.1994). The purpose or function of the doctrine is to protect the integrity of the judicial process or the integrity of courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries. 31 C.J.S. Estoppel & Waiver § 139, at 593 (1996). Judicial estoppel generally applies only to inconsistent statements of fact. Cannon v. H.K. Porter Co., 705 F.Supp. 288 (E.D.Va.1989).
>
> Our research of South Carolina case law has not revealed an explicit discussion of judicial estoppel; however, there are opinions alluding to the doctrine. For example ... Zimmerman v. Central Union Bank, 194 S.C. 518, 532, 8 S.E.2d 359, 365 (1940)("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.").
>
> ***We now explicitly adopt the doctrine of judicial estoppel as it relates to matters of fact (not law)***. In order for the judicial process to function properly, litigants must approach it in a truthful manner. Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in

> the process. The doctrine thus punishes those who take the truth-seeking function of the system lightly. ***When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.*** It is certainly conceivable that parties may want to present novel legal theories, which may require changing one's previous legal theory. However, the truth-seeking function of the judicial process is undermined if parties are allowed to change positions as to the facts of the case, unless compelled by newly-discovered evidence.

Hayne, 489 S.E.2d at 477 (all emphasis added).

"MMI is a factual determination left to the discretion of the [Commission]." Gadson v. Mikasa Corp., 368 S.C. 214, 224, 628 S.E.2d 262, 268 (Ct.App.2006). Accordingly, Appellant is barred by the doctrine of Judicial Estoppel from arguing that she is not at MMI by reason of the future surgery recommended by Dr. Piasecki. Appellant argued at the hearing, unequivocally, that she had reached MMI, and that the future surgery recommended by Dr. Piasecki was merely maintenance care and would not affect Appellant's MMI status. The Single Commissioner made the findings Appellant requested (i.e., that she had reached MMI and the future surgery was maintenance care). She cannot now change her position because she is unhappy with the amount of her permanent disability award.

Appellant also argues it was error for the Appellate Panel to specifically detail the award of future medical treatment, and to preclude any additional invasive procedures from the future medical treatment. In cases of permanent partial disability (such as this case), the Commission is *required* to detail an award of future causally-related medical treatment with as much specificity as possible. The applicable statute is S.C. Code Ann. Section 42-15-60, which states the following:

> (B)(2) Each award of permanency as ordered by the single commissioner or by the commission must contain a finding as to

> whether or not further medical treatment or modalities must be provided to the employee. If the employee is entitled to receive such benefits, ***the medical treatment or modalities to be provided must be set forth with as much specificity as possible in the single commissioner's order or the commission's order***. (emphasis added)

The Appellate Panel appropriately reviewed the evidence in the claim (including the opinion of Dr. Piasecki that Appellant would remain at MMI regardless of surgery) and set forth the causally-related future medical treatment with as much specificity as possible. The Appellate Panel found the following:

> [Appellant] is entitled to future medicals for her left knee which would tend to lessen her period of disability, as ordered by the authorized treating physician, Dr. Piasecki. This would include the modalities described under PLAN in his medical note of October 2, 2013. The future medicals would also include oral medications, injections (even though [Appellant] testified they do not work for her), as well as braces or other orthopedic devices. The future medicals are not to be interpreted to include other invasive procedures beyond those specifically detailed in the medical note of October 2, 2013. (R. p. 77)
>
> The future medicals, outlined above, would not change her MMI status. They are palliative in nature and are designed to maintain her current level of functioning. (R. p. 77)
>
> [Appellant] is also entitled to a work-hardening program of [Respondents'] choosing, should an authorized treating physician order it. (R. p. 77)

The Appellate Panel reviewed the medical evidence, including the recommendations of Dr. Piasecki, and appropriately delineated the future medical treatment. There being no opinion or recommendation for any additional or future invasive procedures beyond the seventh surgery being recommended by Dr. Piasecki, and in light of the fact that Dr. Piasecki and the other doctors had all indicated Appellant had reached MMI, the Appellate Panel appropriately found no basis for inclusion of any additional invasive procedures in Appellant's future medical treatment. In fact, to have ordered any additional invasive procedures would have been purely speculative. The

Appellate Panel's findings are "text book;" there is no error in the award of future medical.

CONCLUSION

Based on the foregoing, Respondents Sunbelt Human Advancement and State Accident Fund respectfully request that the South Carolina Court of Appeals affirm the Decision and Order of the Appellate Panel of the South Carolina Workers' Compensation Commission.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.

BY:______________________________

L. Brenn Watson, Esquire
Willson Jones Carter & Baxley
872 S. Pleasantburg Drive
Greenville, South Carolina 29607
(864) 527-3292
Attorneys for Respondents

January 15, 2016

RECEIVED
JAN 19 2016
SC Court of Appeals

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.

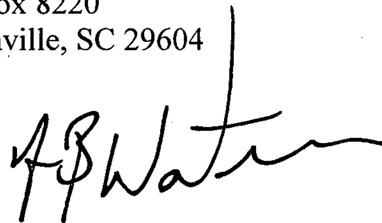
PROOF OF SERVICE

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:

Stephen B. Samuels
Samuels Law Firm, LLC
1320 Richland Street
Columbia, SC 29201

Alton L. Martin, Jr.
Martin & Martin, PA
PO Box 8220
Greenville, SC 29604

January 15, 2016



L. Brenn Watson, Esquire
Willson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, SC 29607
Attorneys for Appellants

RECEIVED
JAN 19 2016
SC Court of Appeals

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,

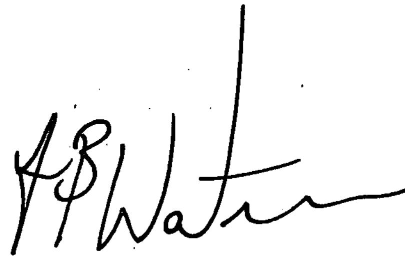
v.

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

CERTIFICATE OF COUNSEL

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

January 15, 2016



L. Brenn Watson, Esquire
Willson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, SC 29607
Attorneys for Appellants

WILLSON JONES CARTER & BAXLEY, P.A.

ATTORNEYS AT LAW

GREENVILLE CHARLESTON COLUMBIA CHARLOTTE RALEIGH ATLANTA

L. Brenn Watson
Direct (864) 527-3292
Fax (864) 373-7060
lbwatson@wjlaw.net

872 S. Pleasantburg Drive
Greenville, SC 29607
www.wjcblaw.net

January 15, 2016

RECEIVED
JAN 19 2016
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
P.O. Box 11629
Columbia, SC 29211

Re: Kimberly Walker vs. Sunbelt Human Advancement
Appellate Case No. 2015-000692
WCC File No.: 0901375 DOI: 2/19/2009
Carrier: State Accident Fund - Claim No.: 2009-703
WJC&B File No.: 0385.00587

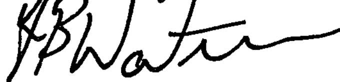
Dear Ms. Kitchings:

Enclosed for filing are one (1) original unbound and fifteen (15) bound copies of Respondents' Final Brief in this case, along with a Proof of Service and certificate of compliance with Rule 211(b). Please file the original and return one clocked bound copy to me in the enclosed, self-addressed stamped envelope. Thank you for your assistance in this matter.

By copy of this letter and enclosure to Alton L. Martin, Jr. and Stephen B. Samuels, counsel of record for Appellant, I am serving them with a copy of Respondents' Final Brief, as indicated by the enclosed Proof of Service.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.



L. Brenn Watson

Enclosures
cc: Mr. Alton L. Martin, Jr.
Mr. Stephen B. Samuels
Ms. Meggan Damiano
South Carolina Workers' Compensation Judicial Department

P ITY
L ★

PRESS FIRMLY TO SEAL

Y SPECIFIED*
INCLUDED*
UDED*
LE

NALLY,
TION
ED.

NEOPOST PRIORITY MAIL
01/15/2016
US POSTAGE $005.95

ZIP 29607
041L10252168

USPS TRACKING #

9114 9014 9645 0231 1101 04

Label 400 Jan 2013
7690-16-000-7948

WILLSON JONES CARTER & BAXLEY, P.A.
ATTORNEYS AT LAW
872 S. PLEASANTBURG DRIVE
GREENVILLE, SC 29607

RECEIVED
JAN 19 2016
SC Court of Appeals

JENNY ABBOTT KITCHINGS,
SOUTH CAROLINA COURT OF APPEALS
1015 SUMTER STREET

COLUMBIA, SC 29211

TYVEK® IS RECYCLABLE.
©2003. DUPONT™ AND TYVEK® ARE TRADEMARKS OF DUPONT.
2 HDPE

PRESS FIRMLY TO SEAL

EP14 July 2013
OD: 11.625 x 15.125

VISIT US AT USPS.COM®
ORDER FREE SUPPLIES ONLINE

This packaging is the property of the U.S. Postal Service® and is provided solely for use in sending Priority Mail® shipments. Misuse may be a violation of federal law. This packaging is not for resale. EP14 © U.S. Postal Service; July 2013; All rights reserved.

DuPont™ Tyvek® Protect What's Inside.™