

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0901375

Kimberly Walker, Claimant, Appellant,

v.

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	7
STANDARD OF REVIEW	16
ARGUMENT	18
1. Kimberly Walker is permanently and totally disabled as there are no jobs available in the national or local economy to someone with the permanent restrictions provided to her by her treating doctors.	18
2. The Appellate Panel erred in limiting Walker's medical treatment to “palliative care” and finding future surgery would not change her MMI status	28
CONCLUSION	33
CERTIFICATE OF COUNSEL	34

TABLE OF AUTHORITIES

CASES

<u>Burnette v. City of Greenville,</u> 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)	16, 20, 27
<u>Carmichael v. Dan Nance Corp.,</u> 264 S.E.2d 601, 274 S.C. 357 (1980)	19 n.4
<u>Carter v. Verizon Wireless,</u> 407 S.C. 641, 757 S.E.2d 528 (Ct. App. 2014)	32
<u>Clark v. Aiken County Government,</u> 366 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005)	30-31
<u>Coleman v. Concrete Products, Inc.,</u> 245 S.C. 625, 142 S.E.2d 43 (1965)	19, 24
<u>Estridge v. Joslyn Clark Controls, Inc.,</u> 325 S.C. 532, 482 S.E.2d 577 (Ct. App. 1997)	31
<u>Hutson v. S.C. State Ports Authority,</u> 399 S.C. 381, 732 S.E.2d 500 (2012)	16, 17, 18
<u>Lark v. Bi-Lo, Inc.,</u> 276 S.C. 130, 276 S.E.2d 304 (1981)	16
<u>Marbury v. Sullivan,</u> 957 F.2d 837 (11th Cir. 1992)	27
<u>McCruiter v. Bowen,</u> 791 F.2d 1544 (11th Cir. 1986)	23
<u>Michau v. Georgetown County,</u> 396 S.C. 589, 723 S.E.2d 805 (2012)	22
<u>National Bank of Honea Path v. Thomas J. Barrett, Jr., & Co.,</u> 174 S.E. 581, 173 S.C. 1 (1934)	27
<u>Pierre v. Seaside Farms, Inc.,</u> 386 S.C. 534, 689 S.E.2d 615 (2010)	16

<u>Potter v. Spartanburg Sch. Dist. 7,</u> 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011)	16, 20
<u>Sanders v. Meadwestvaco Corp.,</u> 371 S.C. 284, 638 S.E.2d 66 (Ct. App. 2006)	30
<u>Shealy v. Aiken Cnty.,</u> 341 S.C. 448, 535 S.E.2d 438 (2000)	27
<u>Stallcup v. Carolina Wood Turning, Co.,</u> 7 S.E.2d 550 (N.C. 1940)	25
<u>Stephenson v. Rice Servs., Inc.,</u> 323 S.C. 113, 473 S.E.2d 699 (1996)	21
<u>Therrell v. Jerry's Inc.,</u> 633 S.E.2d 893, 370 S.C. 22 (2006)	23
<u>Tyler v. Weinberger,</u> 409 F.Supp. 776 (E.D. Va. 1976)	26
<u>Wilson v. Heckler,</u> 734 F.2d 513 (11 th Cir. 1984)	26
<u>Wynn v. People's Natural Gas Co. of S.C.,</u> 238 S.C. 1, 118 S.E.2d 812 (1961)	16, 21
<u>Young v. Tide Craft,</u> 270 S.C. 453, 242 S.E.2d 671 (1978)	21
STATUTES	
S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2011)	16
S.C. Code Ann. § 42-15-60 (2007)	28, 32
S.C. Code Ann. § 42-17-90 (2007)	29

STATEMENT OF ISSUES ON APPEAL

1. Whether the Workers' Compensation Commission erred in holding Kimberly Walker is not permanently and totally disabled as there are no jobs available in the national or local economy to someone with the permanent restrictions provided to her by her treating doctors.
2. Whether the Workers' Compensation Commission erred in limiting Walker's medical treatment to "palliative care" and finding future surgery would not change her MMI status.

STATEMENT OF THE CASE

This is an appeal by Kimberly Walker (“Walker”), Claimant, from a decision of the South Carolina Workers’ Compensation Commission finding that she had reached maximum medical improvement for her work-related injuries and was not permanently and totally disabled. Walker contends the Commission erred in basing its disability on the opinion of Respondents’ vocational expert when the expert, Jan Westmoreland, testified “to a reasonable degree of vocational certainty, that there are no jobs available for Ms. Walker.” [R. p. 752, line 14-p. 753, line 4]. Walker further contends the Commission erred in relying on speculation rather than evidence.

This case has a long procedural history. Walker suffered an admitted work-related injury to her left knee on February 19, 2009 while working for the Employer, Sunbelt Human Advancement (“Employer”). The State Accident Fund (“Fund”) began providing medical treatment and paying temporary total disability compensation while Walker was out of work.

Procedural History prior to this appeal

On September 17, 2010, Walker filed a Form 50 (Request for Hearing). In the Form 50, Walker requested additional treatment for her left knee, right knee, and back, as well as treatment for depression and anxiety. [R. p. 81]

On September 30, 2010, the Fund filed a Form 51 (Employer’s Response to Request for Hearing). The Form 51 admitted the left knee and back, but denied the claim as to right knee, depression and anxiety. [R. p. 82].

On November 23, 2010, the Fund filed a Form 21 (Employer's Request for Hearing) seeking to terminate temporary compensation. [R. p. 83].

Prior to the scheduled hearing, the Parties entered into a Consent Order providing for evaluations for the disputed body parts, while holding the issue of an injury to the psyche in abeyance. [R. pp. 1-3].

On June 7, 2011, Walker filed a Motion for Sanctions under § 42-3-175 for failure to provide medical evaluation and treatment per the terms of the Consent Order. [R. pp. 84-98].

On June 17, 2011, the Fund filed a Response to Claimant's Motion for Sanctions. [R. pp. 99-104]. The Fund contended as a State Agency it was neither required nor authorized to make a pre-payment for a medical evaluation.

On July 11, 2011, Commissioner Bryan Lyndon issued an Order denying the motion for sanctions [R. pp. 4-6]. Without reaching the issue of the Fund's authority to pre-pay for a medical evaluation, he ordered Respondents' attorneys to pre-pay for the evaluation to be reimbursed by the Fund.

On August 15, 2012, Walker filed a Form 50 (Request for Hearing). In the Form 50, Walker requested additional treatment for her left knee, right knee, and back, as well as treatment for depression and anxiety. [R. p. 105]

On September 10, 2012, the Fund filed a Form 51 (Employer's Response to Request for Hearing). The Form 51 admitted the left knee, right knee and back, but denied the claim as depression and anxiety. [R. p. 106].

The case was tried before Commission Andrea Roche on February 14, 2013. By this time, Walker had “. . . undergone six surgical procedures to her left knee. She has also developed problems with her right knee as a result of over-compensation and gait changes, as well as problems with her lower back.” [R. p. 10, lines 25-27]. Commissioner Roche held “the greater weight of the evidence established that Claimant’s pre-existing psychological problems were aggravated by the work accident and its sequelae.” She ordered the Fund to provide psychological treatment for depression and anxiety.

Current Procedural History

On August 26, 2103, Walker filed a Form 50 (Request for Hearing). In the Form 50, Walker contended she was permanently and totally disabled as a result of her multiple injuries. requested additional treatment for her left knee, right knee, and back, as well as treatment for depression and anxiety. [R. pp. 107-108]

On September 20, 2013, the Fund filed a Form 51 (Employer’s Response to Request for Hearing). The Form 51 denied that Walker was totally disabled. [R. p. 109].

On September 20, 2013, the Commission ordered the parties to mandatory mediation per Regulation 67-1801.

As the Fund declined to participate in mediation, Walker filed a Motion to Compel Mediation on November 15, 2013 [R. pp. 110-120].

The motion was set for a hearing on December 5, 2013. Following a pre-hearing conference, Commissioner Aisha Taylor denied the Motion to Compel

Mediation and granted Walker's request for a hearing on her Form 50. The Interim Order was issued on January 3, 2014. [R. pp. 17-18].

On March 12, 2014, the case was tried before Commissioner Gene McCaskill. Walker contended she was permanently and totally disabled. The Fund contended she had not reached maximum medical improvement, as she required a seventh knee surgery. Alternatively, the Fund contended if Walker had reached MMI, then she was employable per the vocational opinion of Jan Westmoreland. [R. p. 791, line 3-p. 794, line 18].

Following the hearing, the Fund stopped providing medical treatment to Walker. On May 1, 2014, Commissioner McCaskill issued an Administrative Order noting he had not yet issued order instructions from the March 12, 2014, but requiring the Fund to provide medical treatment as previously ordered by the Commission. [R. pp. 19-20].

On July 23, 2014, Commissioner McCaskill issued the Decision and Order which is the subject of this appeal. Commissioner McCaskill held Walker had reached maximum medical improvement on December 13, 2013. He held she was not permanently and totally disabled. "[He] base[d] this finding on the vocational opinion of Jan Westmoreland, the medical record as a whole, Claimant's education, [his] observation of Claimant during the hearing, and the evidence in the record as a whole." [R. p. 43, lines 15-17]. Commissioner McCaskill held "... Claimant has sustained 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." [R.

p. 46, lines 7-9]. He further found her “psychological condition is not disabling.” Commissioner McCaskill ordered Respondents to provide the seventh knee surgery, but found “[t]he 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.”

On July 28, 2014, Walker filed a Form 30 (Request for Commission Review) [R. pp. 700-701].

The appeal was argued before the Appellate Panel on November 18, 2014.

On March 4, 2015, the Appellate Panel issued its Decision and Order affirming the Single Commissioner’s Decision and Order in its entirety [R. pp. 48-80].

This appeal followed.

STATEMENT OF THE FACTS

At the time of the hearing on March 12, 2014, Walker was 45 years old. Walker obtained a bachelor's degree. She also earned a master's degree in human resources in the late 2000's. [R. p. 819, lines 3-6]. Walker worked as a supervisor for Sunbelt Human Resources for 20 years – until her employer terminated her because it could not accommodate the work restrictions from her injury. [R. p. 796, lines 1-15].

On February 19, 2009, Walker injured her left knee in an admitted work-related accident. Walker was ultimately referred to an orthopaedic surgeon, Dr. Vann, who performed three surgeries to her left knee. During this time, she was on crutches for a total of 11 months. [R. p. 797, lines 2-18]. Dr. Vann released her on September 26, 2010. [R. p. 414].

The Fund then sent Walker for a second opinion to Dr. Cordas. Dr. Cordas ordered a new MRI and recommended more treatment. Walker was then sent to Dr. Burnkiel to see if she was a good candidate for a total knee replacement (Walker has not yet received a knee replacement). She also underwent an MRI on her right knee. She was returned to Dr. Cordas, who referred her to Dr. Dana Piasecki at Ortho Carolina in Charlotte.

Walker treated with Dr. Piasecki from August 30, 2011 through January 13, 2014.¹ She underwent three more operations on her left knee (total of six). The

¹This is the most recent medical report in the record from Dr. Piasecki. Walker continues to treat with Dr. Piasecki and, as of the hearing, was awaiting authorization from Respondents for the seventh surgery. [R. p. 794, lines 7-11].

surgeries were extensive involving “left knee arthroscopy, chondroplasty, hardware removal, and tibial bone grafting status post prior HTO and ACI of the medial femoral condyle.” [R. p. 135, lines 5-7].

On November 21, 2012, Dr. Piasecki wrote “I am skeptical that additional surgery here would make her substantially better given her multifocal complaints today and have simply suggested that we will rate and release her and give her some time away from surgery to reflect on things.” Dr. Piasecki assigned a 25% impairment rating. He wrote: “Final restrictions are provided based on an anticipated sedentary occupation of sit down work only. I do not see any physical reason why she would not be able to maintain a job of normal hourly duration during the day provided she is not required to do heavy lifting, deep bending, squatting, stair climbing, or the like.” [R. pp. 141-143]. Dr. Piasecki also completed a Form 14B repeating the rating and restrictions, along with noting “[a]s of the date I last saw this patient, it is **my professional medical opinion** the claimant . . . **will not** need future medical care . . .” [R. p. 144, lines 16-18]. Dr. Piasecki also hand wrote a Work Status note with permanent restrictions of “**No lifting . . . No prolonged bending, stooping, squatting, kneeling, or twisting; Sit down work only; No ladder / stair-climbing.**” [R. p. 145 (emphasis added)].

Despite the release, Walker returned to Dr. Piasecki on September 11, 2013. Dr. Piasecki recorded that “her symptoms have gotten worse over the past couple of months with respect to weightbearing, chiefly to the point that she is now limping.” Dr. Piasecki ordered an MRI to determine whether an injection or additional surgery

was more appropriate. [R. p. 138]. Walker returned on October 2, 2013 for review of the MRI. Dr. Piasecki recommended a seventh surgery – specifically “a diagnostic arthroscopy with evaluation of her chondral surfaces with possible debridement versus chondroplasty depending on the status of the cartilage on arthroscopy.” R. pp. 135-136].

On January 13, 2014, Dr. Piasecki reviewed a Functional Capacity Evaluation (FCE) which had been performed on Walker on October 25, 2012.² Dr. Piasecki agreed that “. . . the restrictions provided in that FCE . . . [m]ost probably remain an accurate description of Ms. Walker’s physical limitations.” [R. p. 134, lines 16-18]. Per the FCE, Walker “. . . does not even meet the criteria for even sedentary work. This means that her overall classification at this time is below Sedentary.” [R. p. 351, lines 38-40].

By February 2013, Walker had “. . . undergone six surgical procedures to her left knee. She has also developed problems with her right knee as a result of over-compensation and gait changes, as well as problems with her lower back.” [R. p. 10, lines 25-27]. She saw several doctors for her back, ultimately ending up with Dr. Math.

Dr. Math provided pain management for Walker’s back and knees beginning on October 28, 2010. Dr. Math performed a rhizotomy on Walkers’ back in an effort to provide pain relief. Dr. Math placed Walker at maximum medical improvement

²The FCE had been recommended by Dr. Piasecki on September 18, 2012. [R. p. 148]. The Fund – as it has done throughout this case – refused to pay for the FCE. Walker, through her attorney, paid for the FCE herself.

on March 4, 2013 with a 25% medical impairment to her left knee and a 1% medical impairment to her lumbar spine. **Dr. Math assigned permanent restrictions to Walker of “sedentary work 2.5 hr/day with frequent breaks.”** She also ordered chronic pain management with ongoing injections, medication and a TENS unit. [R. p. 303 (emphasis added)].

Dr. Math also reviewed the FCE. [R. pp. 340-351]. “[Dr. Math] agree[d] with the permanent physical restrictions provided by the FCE. **Ms. Walker most probably cannot perform the full range of sedentary work.**” [R. p. 304 (emphasis added)]. Notably, on February 4, 2013, Dr. Math spoke with the physical therapist “who felt as though the [patient] gave good effort, but would likely be able to do more if she went through a formal work hardening program.”³ [R. p. 308, lines 26-28].

The therapist who performed the FCE wrote “. . . [Walker] gave a reliable effort, with 15 of 20 consistency measures within expected limits.” [R. p. 351, lines 3-4]. The therapist concluded:

According to the FCE results the evaluatee is only capable of performing tasks Occasionally. To be classified as sedentary, an individual must be able to perform a minimum of 6 hours per 8 hour day in sitting with the remaining 2 hours in standing. For standing job, an individual must be able to perform a minimum of 6 hours per 8 hour day in standing with the other 2 hours in sitting for Sedentary classification. **The evaluatee does not even meet the criteria for even**

³Respondents had refused to provide the work hardening. The Commission ruled “Claimant is also entitled to a work-hardening program of Defendants’ choosing, should an authorized treating physician order it.” [R. p. 77, lines 21-22]. As the work hardening was never provided, the subsedentary restrictions assigned by the doctors are the maximum level at which Walker could perform.

sedentary work. This means that her overall classification at this time is below Sedentary. [R. p. 351, lines 35-40 (emphasis added)].

In addition to her physical injuries, Walker developed depression and anxiety arising out of her physical disabilities. On June 23, 2011, she began treatment with Dr. David Tollison, a psychologist at the Advanced Center for Pain Management. Two and a half years later, she had made little progress, as shown by this entry in Dr. Tollison's records from December 3, 2013:

Clinical Status: "I called your office yesterday and wanted to come in and see you yesterday but you were in your Spartanburg office I just felt overwhelmed and I wasn't going to kill myself but I just feel like I didn't want to live." She complains of being forgetful, driving one place where I mean to go somewhere else and sometimes I feel like my speech is affected, like my brain and mouth aren't connected." She appears more anxious and somewhat agitated today and admits to feeling frustrated "because of pain." We discussed at some length suicide and she repeatedly offers that she "would never" do anything like that "because I have children and I would never hurt them." She has strong religious faith.

[R. p. 214, lines 21-27(quotes and ellipse in original)].

On December 16, 2013, Dr. Tollison opined she had reached MMI for her psychological problems with a 10% impairment to the whole body. Regarding permanent work restrictions or limitation, Dr. Tollison opined Walker is "**unable to maintain concentration for prolonged periods of time.**" [R. p. 210 (emphasis added)].

Walker also treated with psychiatrists Dr. David Jacobs and Dr. Sergio Sanchez beginning on March 27, 2013. [R. pp. 253-273]. These doctors provided medication management for her work related psychiatric condition of "Adjustment disorder with mixed anxiety and depressed mood." She also was diagnosed with

“Major depressive disorder, recurrent episode, severe, without mention of psychiatric behavior.” [R. p. 260]. She was prescribed Wellbutrin and Sertraline for these conditions [R. p. 254].

As to her employment, Walker began working with Sunbelt Human Resources on June 22, 2009. [R. p. 675]. The Employer provides social workers to families in need. Walker eventually rose to the level of a supervisor.

Following her injury and resulting surgeries, Walker missed a significant time from work. She eventually was terminated as she had exhausted her leave time and was unable to perform the essential functions of her (sedentary) job.

On May 10, 2013, Walker filed a claim with the EEOC under the Americans with Disabilities Act (ADA). Her complaint states:

I have been denied accommodation to return to work from medical leave. I have made regular attempts to determine when I would be allowed to return to work and the status of my employment including May 11, 2012, September 10, 2012, and January 2, 2013. [R. p. 675].

The Employer responded to the EEOC complaint with documentation showing it was unable to accommodate Walker’s physical restrictions. The Employer had asked Dr. Piasecki for current restrictions, asking him to complete a form. Dr. Piasecki responded with the completed form on March 1, 2012. [R. p. 681]. After receiving this form, the Employer’s HR Director, Carol Hallman, gave Walker another form to give Dr. Piasecki. He completed the second questionnaire on March 26, 2012. [R. p. 177].

Walker's attorney sent the second questionnaire to the Employer that same day. The purpose was to obtain "information from her doctor as to when and if she would be able to return to work and perform the essential functions of her job." [R. p. 688]. After reviewing the medical information from Walker's doctor, Hallman determined that Walker would be terminated effective March 30, 2012 as "[w]e have no information as to when she will be able to perform the essential functions of her job." [R. p. 688].

On October 29, 2012, Walker underwent a vocational evaluation by Certified Vocational Evaluator, Rock Weldon. Weldon opined at that time that "The results of this evaluation indicate Ms. Walker is unable to return to the types of work she has performed in the past. Additionally, it is my vocational opinion that she is a poor candidate for vocational rehabilitation to other simpler, lighter work. She should be considered permanently and totally disabled." [R. pp. 127-133 (emphasis added)].

On January 27, 2014, Weldon reviewed updated records from Drs. Sanchez, Tollison, Math and Piasecki. He stated: "After review of the additional documents as outlined above, I continue to believe that Ms. Walker is unable to perform work at any exertion or skill level and should be considered permanently and totally disabled. [R. pp. 1-2].

Respondents obtained a competing evaluation from Jan Westmoreland. In her report, Westmoreland opined that Walker was not permanently and totally disabled. However, in reaching this conclusion, she ignored the physical restrictions placed on Walker by her doctors (and appeared to be unaware of the difficulty in

concentrating reported by Dr. Tolleson). In her deposition, Westmoreland conceded that these restrictions rendered Walker unemployable.

Q. ... [T]ell me what jobs are available in the national or local economy with someone with the restrictions provided to her by the function capacity evaluation, Dr. Math, her authorized back doctor, and Dr. Piasecki, her authorized knee doctor?

A. With that in consideration, there would be none at this time.

Q. There are none in existence?

A. At this time.

Q. Okay. So if you followed the restrictions provided to you by the authorized treating doctors, it would be your opinion, to a reasonable degree of vocational certainty, that there are no jobs available for Ms. Walker?

A. That is correct.

[R. p. 752, line 14-p. 10, line 4].

Walker ultimately dropped her EEOC claim against the Employer. She testified: "When I went to the EEOC, I was angry and hurt and nobody would respond to me from the job. Nobody would tell me -- I worked for that agency for 20 years and I worked hard and they treated me with such disrespect. All I wanted to know as what's the status of my job." [R. p. 857, lines 5-11].

Walker stated, at the time ". . . I thought I could work two to five hours. Nobody -- the doctor never -- until I saw -- until Dr. Math said two and a half hours a day, I can't work anywhere for that." [R. p. 857, 12-15].

Walker remains disabled and out of work. Following the hearing, Respondents cut off her medical treatment. While the ultimate decision was pending,

Commissioner McCaskill ordered Respondents to provide treatment in compliance with the previous orders of the Commission. [R. pp. 19-20]]

STANDARD OF REVIEW

The Administrative Procedures Act (“APA”) provides the standard for judicial review of decisions by the Commission. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). Under the APA, the appellate court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2011).

“[T]he guiding principle undergirding our workers’ compensation system [is] that the Act is to be liberally construed in favor of the claimant. The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation.” Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012). The Commission’s decision “must be founded on evidence of sufficient substance to afford a reasonable basis for it.” Wynn v. People’s Natural Gas Co. of S. C., 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).

The Commission is permitted to disregard medical evidence only when there is other competent evidence in the record to support their conclusion. Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011). Where a finding is based on “the medical opinion of the single commissioner, adopted by the Commission,” rather than on the opinion of a medical provider, the finding must be reversed as unsupported by substantial evidence. Burnette v. City of Greenville, 737

S.E.2d 200, 401 S.C. 417 (Ct. App. 2012). A conclusion by the Commission “based on rank speculation . . . cannot now be used as the basis for denying [an injured worker’s] claim for lost wages.” Hutson at 504, 732 S.E.2d 694.

ARGUMENT

1. **Kimberly Walker is permanently and totally disabled as there are no jobs available in the national or local economy to someone with the permanent restrictions provided to her by her treating doctors.**

The Appellate Panel held:

Claimant is not permanently and totally disabled. (We base this finding on the vocational opinion of Jan Westmoreland, the medical record as a whole, Claimant's education, and the evidence in the record as a whole). [R. p. 77, lines 2-4].

This finding is in error because Westmoreland testified there are *no jobs in existence within the national or local economy* for someone with Walker's permanent work restrictions. When specifically asked: "So if you followed the restrictions provided to you by the authorized treating doctors, it would be your opinion, to a reasonable degree of vocational certainty, that there are no jobs available for Ms. Walker," Westmoreland replied: "That is correct." [R. p. 752, line 24-p. 753, line 4]. The Commission cannot state it relied on "the vocational opinion of Jan Westmoreland" to find Walker is not permanently and totally disabled – not when Westmoreland testified to exactly the opposite of the Commission's finding. To disregard this expert's opinion – when it matches the opinion of the other expert (Rock Weldon) is arbitrary and capricious. See Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion because "rank speculation" cannot outweigh competent evidence of disability).

The determination of disability in workers' compensation is a multi-step analysis. See Coleman v. Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965). Coleman sets out three alternative methods of proof (1) expert vocational testimony; (2) testimony of employers who refused to hire the claimant; and (3) "diligent efforts to secure employment."⁴ Id. Although any one of these methods will suffice, Walker proved her case both by expert vocational testimony and the testimony of her employer (Sunbelt) who was unable to accommodate her restrictions.

The first step is determining the physical restrictions resulting from the injury. In the instant case, Walker was treated by three doctors who addressed her restrictions. Dr. Piasecki treated her left knee. Dr. Math provided pain management for her back and both knees. Dr. Tollison provided psychological treatment.

As a step towards aiding these doctors in determining her restrictions, Walker underwent a Functional Capacity Evaluation (FCE) recommended by Dr. Piasecki. The therapist who performed the FCE opined Walker "... gave a reliable effort, with 15 of 20 consistency measures within expected limits." [R. p. 351, lines 3-4]. The test revealed: "The evaluatee does not even meet the criteria for even sedentary work. This means that her overall classification at this time is below Sedentary." [R. p. 351, lines 38-40].

⁴There is no requirement that a disabled employee engage in a failed work search to prove disability; and certainly not when it would be a useless and futile act. Cf. Carmichael v. Dan Nance Corp., 264 S.E.2d 601, 274 S.C. 357 (1980) ("Equity will not require the doing of a futile task, nor foreclose the rights of a party . . . for failure to do something which in view of all the facts would have been useless.").

The therapist was not deposed nor is there a competing FCE. Both treating doctors, Dr. Piasecki and Dr. Math, opined the FCE was a valid measure of Walker's physical restrictions. As such, the FCE is valid and must be considered so by the Commission. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012) (finding based on commissioner's own medical opinion is not substantial evidence and must be reversed).

"[Dr. Math] agree[d] with the permanent physical restrictions provided by the FCE. Ms. Walker most probably cannot perform the full range of sedentary work." [R. p. 304, lines 17-18]. Dr. Math was especially familiar with the FCE as she had spoken with the physical therapist about it on February 4, 2013. [R. p. 308, line 26]. When Dr. Math placed Walker at maximum medical improvement on March 4, she assigned permanent restrictions to Walker of "sedentary work 2.5 hr/day with frequent breaks." [R. p. 303, lines 12-13].

On January 13, 2014, Dr. Piasecki also confirmed that "... the restrictions provided in that FCE . . . [m]ost probably remain an accurate description of Ms. Walker's physical limitations." [R. p. 134, lines 16-18]. This means that as of Westmoreland's deposition on February 10, 2014 and the hearing on March 12, 2014, the restrictions from Dr. Piasecki, Dr. Math, and the FCE were all current and accurate. There was no basis for disregarding this medical evidence – particularly disregarding positive evidence in favor of speculation. See Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011)(commission is permitted to

disregard medical evidence only when there is other competent evidence in the record to support their conclusion).

The next step in the analysis is determining whether the employee is unable to perform services other than those that are “so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist.” See, e.g. Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961). In answering this question, the Commission can rely on expert vocational testimony – provided the vocational expert’s opinion is founded on the physical limitations established by the doctors. See Stephenson v. Rice Servs., Inc., 323 S.C. 113, 116, 473 S.E.2d 699, 700 (1996)(The ability to perform limited tasks for which no stable job market exists does not prevent an employee from proving total disability).

As the Commission emphasized it relied on the “opinion of Jan Westmoreland,” her opinion is a good place to start. The question is whether Westmoreland’s opinion has any evidentiary basis in the restrictions established by Walker’s physicians. See Young v. Tide Craft, 270 S.C. 453, 468, 242 S.E.2d 671, 678 (1978)(“It is, of course, elementary that the factual or underlying basis for the expert’s opinion be set out, otherwise the opinion lacks probative value.”). A look at both the medical evidence and the definition of sedentary duty shows her report does not – as she herself conceded in her deposition testimony. Any opinion of Westmoreland’s that there is work available in the competitive labor market to Walker is pure speculation – founded entirely on a blatant disregard of the restrictions and limitations occasioned by her injury. As such, her “opinion lacks

probative value” and should not have been relied on by the Appellate Panel. See Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)(“To use such unsupported and wildly optimistic goals which are in direct conflict with the only concrete evidence in the record would turn the Act on its head and violate the stated policy behind it.”); Michau v. Georgetown County, 396 S.C. 589, 723 S.E.2d 805 (2012)(reversing Commission’s finding based on incompetent expert opinion and remanding for Commission to decide whether the remaining competent evidence supports employee's claim).

Westmoreland’s testimony is unequivocal:

Q. ...[T]ell me what jobs are available in the national or local economy with someone with the restrictions provided to her by the function capacity evaluation, Dr. Math, her authorized back doctor, and Dr. Piasecki, her authorized knee doctor?

A. With that in consideration, there would be none at this time.

Q. There are none in existence?

A. At this time.

Q. Okay. So if you followed the restrictions provided to you by the authorized treating doctors, it would be your opinion, to a reasonable degree of vocational certainty, that there are no jobs available for Ms. Walker?

A. That is correct.

[R. p. 752, line 14-p.753, line 4].

To be sure, Westmoreland tried to stick by her opinions when questioned by Respondents’ attorney. But in so doing, she was forced to reject the very foundation of a vocational expert’s opinion – the physical limitations resulting from the injury.

In rejecting the foundation for the opinion in her report, she revealed that her report was based on speculation.

The Commission compounded this error by relying on Westmoreland's speculation. Indeed, while acknowledging that Westmoreland was deposed, the Commission overlooked her unequivocal testimony to a reasonable degree of vocational certainty that "there are no jobs available for Ms. Walker." [R. pp. 752-753]. Westmoreland's opinion that "there would be none at this time" truly does "provide more insight into her evaluation and the methodology behind it." It cannot be used to support the Commission's ultimate finding, nor can the medical records or other evidence in the record. See McCruter v. Bowen, 791 F.2d 1544 (11th Cir. 1986)(holding that an administrative decision is not supported by substantial evidence where the ALJ acknowledges only the evidence favorable to the decision and disregards contrary evidence). Cf. Therrell v. Jerry's Inc., 633 S.E.2d 893, 370 S.C. 22 (2006) ("Though the workers' compensation commission carries the duty to determine how an injury is compensable, the commission makes this decision based on submitted evidence, not out of thin air.").

Another important factor is that Walker's employer of 20 years could not accommodate her restrictions – even though her job with the Employer was considered sedentary.⁵ The Employer's HR Director, Carol Hallman, sought

⁵The full PDL definition for sedentary duty states:

S-Sedentary Work - Exerting up to 10 pounds of force occasionally (Occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift,

“information from her doctor as to when and if she would be able to return to work and perform the essential functions of her job.” [R. p. 688]. After reviewing the medical information from Walker’s doctor, Hallman determined that Walker would be terminated effective March 30, 2012 as “We have no information as to when she will be able to perform the essential functions of her job.” [R. p. 688]. Walker’s condition never improved. Indeed, Walker testified she was getting worse – a point confirmed by Dr. Piasecki when he recommended the seventh knee surgery. [R. p. 858, line 21-p. 859, line 3] [R. p. 135-136]. See Coleman v. Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965)(testimony of an employer who is unable to employ claimant is a valid means of proving total disability)

The Commission engaged in an “unusual finesse of reasoning” to reject the opinions of the doctors and vocational experts. As the basis for denying permanent and total disability, the Commission made two findings. These findings state:

When we view the record as whole, reviewing Claimant’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 Claimant is not credible.

With such a finding, given that many of the medical opinions are dependent on the subjective complaints of the Claimant, these conclusions must be viewed in a questionable light as well. That being said, the empirical medical evidence stands on its own.
[R. p. 76, lines 16-22].

carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

The Commission never truly explains its basis for rejecting the medical restrictions placed on Walker by her treating doctors. Indeed, there is no explanation, for the doctors uniformly believed Walker's complaints. Neither Dr. Piasecki nor Dr. Math nor Dr. Tolleson ever questioned the credibility of Walker's complaints nor the seriousness of her injuries. The doctors uniformly documented permanent impairment. Drs. Piasecki and Math concurred with the validity of the FCE and Walker's subsidiary restrictions. Dr. Tolleson opined she would have difficulty concentrating.

The Commission blithely disregarded these restrictions – effectively stating that *all* the treating doctors got it wrong; that somehow they were fooled every time they examined Walker, such that their “conclusions must be viewed in a questionable light . . .⁶ This is patently speculation, completely unfounded in the evidence. See Stallcup v. Carolina Wood Turning, Co., 7 S.E.2d 550 (N.C. 1940)(Seawell, J. dissenting)(“How far the Industrial Commission may be indulged in refusing to believe credible testimony is still to be worked out, but its arbitrary disregard of

⁶The Appellate Panel never saw Walker in person. The Single Commissioner observed her for two hours and forty-two minutes. [R. p. 70, lines 20-23]. Dr. Piasecki saw Walker multiple times beginning on August 30, 2011 and continuing through the present – performing three operations on Walker and planning a fourth. [R. pp. 134-209]. Dr. Math and her staff treated Walker continuously from October 28, 2010 through the present – a period over three years. [R. pp. 174-331]. Dr. Tolleson treated Walker from June 23, 2011 through the present. [R. pp. 210-252]. Not one of these doctors questioned Walker's credibility. There is no suggestion from any one of them that Walker was not severely disabled, that her complaints were not genuine or that she was malingering.

positive testimony and the substitution therefor of mere speculation is within the power of review and correction by this Court.”).

Here, the Appellate Panel engaged in so-called “sit and squirm” jurisprudence when it discounted Walker’s testimony about pain based on the single Commissioner’s observation that “. . .[Walker] did not appear to be in a great deal of physical distress.”⁷ [R. p. 70, line 22]. Rulings of this type have been roundly condemned by the Federal Courts as inherently unreliable. “In ‘sit and squirm’ jurisprudence, [a commissioner] who is not a medical expert will subjectively arrive at an index of traits which he expects the claimant to manifest at the hearing. If the claimant falls short of the index, the claim is denied.” Wilson v. Heckler, 734 F.2d 513 (11th Cir. 1984). This approach “will not only result in unreliable conclusions when observing claimants with honest intentions, but may encourage claimants to manufacture convincing observable manifestations of pain or, worse yet, discourage them from exercising their right to appear before [the commission] for fear that they may not appear to the unexpert eye to be as bad as they feel.” Tyler v. Weinberger, 409 F.Supp. 776 (E.D. Va. 1976)(finding claimant disabled as a matter of law where factual finding that claimant “over-exaggerated his complaint about sitting for extended periods” was “unreasonable under the law and this Court does not accept them.”). A hearing officer “may not arbitrarily substitute his own hunch or intuition

⁷The single Commissioner's observation that Walker stood “three times during the hearing” comports with the medical evidence and confirms that she is unable to sit for long periods. Indeed, the fact she could not sit through a two hour and forty-two minute hearing supports the accuracy of Dr. Math’s restriction of “sedentary work 2.5 hr/day with frequent breaks.” [R. p. 303].

for the diagnoses of a medical professional.” Marbury v. Sullivan, 957 F.2d 837, 840-41 (11th Cir. 1992) (Johnson, J., concurring). Cf., Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012) (finding based on commissioner’s own medical opinion is not substantial evidence and must be reversed).

If the standard of review were a scintilla of evidence, then it would be enough for the prevailing party below to find the one piece of paper that somewhat supports the decision and that would be the final answer. However, while substantial evidence is a relatively deferential standard of review, “Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached.” Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). See also, National Bank of Honea Path v. Thomas J. Barrett, Jr., & Co., 174 S.E. 581, 173 S.C. 1 (1934)(“If it be conceded that there may be deduced by a process of unusual finesse of reasoning that there is a scintilla of evidence . . . nevertheless there is another rule, more founded upon common sense and reason, to the effect that when only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for the jury.”) The role of the appellate courts is to meaningfully analyze the entire record evidence under this standard. By the same token, the Commission’s findings must be based

on material evidence – not on mining the record for inconsequential nuggets to give the illusion of evidentiary support to an arbitrary and speculative conclusion.

In the instant case, the treating doctors uniformly assigned sub-sedentary work restrictions to Walker. The vocational experts uniformly opined that there are *no jobs in existence within the national or local economy* for someone with Walker’s permanent work restrictions. The Commission’s holding that Walker is not permanently and totally disabled is unsupported by substantial evidence and must be reversed as a matter of law.

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

It is undisputed that Walker will require a seventh knee surgery. Moreover, the seventh knee surgery is a result of her condition worsening since the initial finding of MMI by Dr. Piasecki. The Appellate Panel made a finding that “The future medical, 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, lines 12-20]. Should the Court reverse on the disability issue, then the medical treatment issue would effectively be moot as the statute provides lifetime compensation for persons deemed permanently and totally disabled. See S.C. Code Ann. § 42-15-60 (2007)(“In cases in which total and permanent disability results, . . . treatment or care shall be paid during the life of the injured employee. . .”).

However, if Walker is not deemed permanently and totally disabled, it would be legal error to hold that a future surgery would not change her MMI status, as it

would effectively bar her from filing a change of condition. The ability to file a change of condition for the worse is a substantial right specifically enshrined in the Act. See S.C. Code Ann. § 42-17-90 (2007)(“[T]he commission may review an award and on that review may make an award ending, diminishing, or increasing the compensation previously awarded, on proof by a preponderance of the evidence that there has been a change of condition caused by the original injury, after the last payment of compensation.”).

Walker was originally placed at MMI by Dr. Piasecki on November 21, 2012. [R. pp. 141-143]. Walker returned to Dr. Piasecki on September 11, 2013. Dr. Piasecki recorded that “her *symptoms have gotten worse* over the past couple of months with respect to weightbearing, chiefly to the point that she is now limping.” [R. p. 138, lines 10-11 (emphasis added)]. On October 2, 2013, Dr. Piasecki recommended a seventh surgery – specifically “a diagnostic arthroscopy with evaluation of her chondral surfaces with possible debridement versus chondroplasty depending on the status of the cartilage on arthroscopy.” [R. pp. 135-136].

At the time of the hearing, Walker had not yet undergone the surgery. It is undisputed that she will need it and Respondents indicated their willingness to provide it.”⁸ Although the surgery may or may not improve Walker’s overall

⁸At the March 12, 2014 hearing, Respondents’ counsel stated “The State Accident Fund has offered that seventh surgery.” [R. p. 793, lines 11-12]. However, on May 1, 2014, Commissioner McCaskill was forced to issue an Administrative Order noting he had not yet issued order instructions from the March 12, 2014, but requiring the Fund to provide medical treatment as previously ordered by the Commission. [R. pp. 19-20]. The surgery is now being provided.

condition, it will certainly render her temporarily totally disabled for at least some period of time during the recovery period. As such, her total inability to work would be considered a change of condition for which she should not be procedurally barred from receiving additional compensation.

A similar issue was addressed by this Court in Clark v. Aiken County Government, 366 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005). In Clark, the treating doctor determined Clark needed surgery. The surgery was performed after the single Commissioner hearing determining his disability and prior to the Appellate Panel hearing the case. The Appellate Panel affirmed the single Commissioner's disability award of 30% to the back.

Clark then filed for a change of condition – based on his increased disability following the surgery. The Commission found Clark had suffered a change of condition for the worse and determined he was now permanently and totally disabled.

The employer appealed, contending Clark's change of condition was barred because the surgery had occurred prior to the Appellate Panel reviewing the original award. This Court rejected that argument, observing: "Clark had no way of knowing if the surgery would improve his condition, and, therefore, the degree of change in condition was not yet ripe for review by the full commission. Furthermore, inasmuch as the surgery's aim was to lessen Clark's degree of disability, the County was not prejudiced by having to wait for the natural and expected improvement of his physical condition following surgery." Id. at 103. Cf. Sanders v. Meadwestvaco

Corp., 371 S.C. 284, 638 S.E.2d 66 (Ct. App. 2006)(disability award cannot be based on potential need for future surgery).

In an even earlier case, this Court explained that a symptom which is “present and causally connected, but found not to impact upon the claimant’s condition at the time of the original award, may later manifest in full bloom and thereby worsen his or her condition. Such an occurrence is within the reasons for the code section involving a change of condition.” Estridge v. Joslyn Clark Controls, Inc., 325 S.C. 532, 540, 482 S.E.2d 577, 581 (Ct. App. 1997).

This is the situation we have here. Palliative care generally includes pain management and ongoing therapy and injections. It most certainly does not include an invasive surgical procedure; not when the outcome of that procedure is yet to be determined. In recommending the seventh surgery, Dr. Piasecki specifically stated the surgery would be “a diagnostic arthroscopy with evaluation of her chondral surfaces with possible debridement versus chondroplasty *depending on the status of the cartilage* on arthroscopy.” [R. pp. 135-136 (emphasis added)]. The fact the type of surgery, let alone the outcome, is contingent on what the doctor finds when he opens her up is proof that this is not mere palliative treatment “designed to maintain her level of functioning.” [R. p. 77, lines 19-20].

Furthermore, the Commission improperly ruled that “The future medicals are not to be interpreted to include other invasive procedures beyond those specifically detailed in the note of October 2, 2013.” [R. p. 77, lines 12-18]. This finding arbitrarily limits the treatment Dr. Piasecki can perform – even if Walker requires


additional surgeries beyond the one she needs right now. The statute requires the employer to furnish “any medical care or treatment that is considered necessary by the attending physician, unless otherwise ordered by the commission for good cause shown.” S.C. Code Ann. § 42-15-60 (2007). There is no good cause for the Commission to limit Dr. Piasecki’s treatment in this manner. See Carter v. Verizon Wireless, 407 S.C. 641, 757 S.E.2d 528 (Ct. App. 2014)(“We find the Appellate Panel’s restriction [on future medical treatment] affected Claimant's substantial right to receive future medical care and treatment that would tend to lessen the period of her disability.”). The finding is unsupported by any evidence and violates the law - as well as potentially precluding Walker from filing for a change of condition.

The Appellate Panel’s finding that the additional surgery will not change Walker’s MMI status should be reversed, as should the finding that invasive treatment is limited to this one surgery. The findings are arbitrary, capricious and speculative, thus constituting an error of law.

CONCLUSION

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

Respectfully Submitted



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Columbia, South Carolina
January 19, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0901375

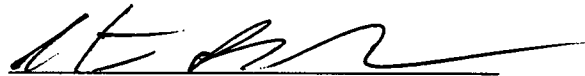
Kimberly Walker, Claimant, Appellant,

v.

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

CERTIFICATE OF COUNSEL

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



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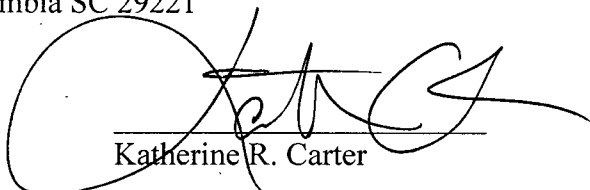
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PROOF OF SERVICE

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

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