

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1115485
Appellate Case No. 2018-001197

RECEIVED

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SC Court of Appeals

Lamar Clark, Appellant,

v.

Philips Electronics/Shakespeare, Employer,
and Gallagher Bassett Services, Carrier, Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Workers' Compensation Commission erred in basing its denial of permanent and total disability benefits on its speculative assessment about how certain information might have affected opinions offered by medical doctors and by other expert witnesses.
- II. Whether the commission also erred in entering an order that does not explain important findings, thereby precluding meaningful judicial review, and containing other findings that are clearly erroneous.

STATEMENT OF THE CASE

This case is about the Workers' Compensation Commission's decision to reverse a single commissioner's award of permanent and total disability benefits.

Lamar Clark injured his back at work in July of 2011. In his initial filing with the commission he explained he and a co-worker were lifting a 27-foot long "cross-arm" when it slipped out of their hands. (1/24/13 Form 50, ¶1b). Mr. Clark reached down and caught his end of the cross-arm around knee level, twisting his back. *Id.* A "cross-arm" is a heavy fiberglass beam apparently used for light poles. (Clark Depo.p.37, line 24 - p.39, line 7).

Respondents admitted the back injury and provided Mr. Clark with medical treatment. He was first diagnosed with pulled muscles, (APAp.1918), but an MRI revealed a herniated disc. (APAp.91). A subsequent diagnostic test confirmed radiculopathy—pain, numbness, and tingling in other parts of the body—caused by a pinched nerve in Mr. Clark's back. (APAp.104). This was consistent with Mr. Clark's complaint of burning pain down the back of his left thigh, into his calf, and occasionally in his left foot. *Id.*

The case has a lengthy procedural history. A large part of the reason for this is that Mr. Clark had back surgery and got better before getting worse. He had his first surgery in

April of 2012 and was placed at MMI in January of 2013. An MRI in June, however, showed another herniated disc requiring a second surgery. See (APApp.3, 19, & 27).

Formal proceedings at the commission began in January of 2013 following the first declaration of MMI. Mr. Clark filed a Form 50 alleging injuries to his back, left leg, and other parts of his body. (1/24/13 Form 50, ¶¶1a & b). Respondents filed a Form 21 in April noting the back injury was admitted, asking to stop paying temporary disability benefits, and requesting the commission determine Mr. Clark's permanent award. (Form 21).

The case was not tried, however, until September of 2016. Again, this was in large part due to the fact that the first declaration of MMI had been premature and that Mr. Clark had a second surgery in September of 2013. (APAp.28). The surgeon released Mr. Clark to a pain management doctor in July of 2014. (APAp.49). The pain management doctor placed Mr. Clark at MMI in August of 2015. (APAp.124). The trial in front of the single commissioner was roughly a year later.

When the case was tried to the single commissioner, the focal points were whether Mr. Clark had more than one body part affected by the injury and the extent of his disability.

Mr. Clark claimed he was permanently and totally disabled. He sought benefits under two statutes: section 42-9-30(21), applying to back injuries, and section 42-9-10, requiring an injury affecting multiple body parts. Mr. Clark noted he had been out of work and on temporary total disability benefits since his first surgery. He sought future medical benefits including a psychological evaluation. (9/6/16 Tr.p.19, line 22 - p.22, line 8).

Respondents argued Mr. Clark had injured one body part only and that his back injury was not severe-enough to qualify for permanent and total disability. Respondents

alternatively argued that if Mr. Clark's back injury affected other parts of his body, he could not show the injuries reduced his earning capacity. (Id.p.22, line 16 - p.23, line 19).

During the trial, however, the key feature of Respondents' case became impeaching Mr. Clark. In 2006, Mr. Clark went to the hospital for pain in his low back with some radiation in his legs. (APAp.2141). He was diagnosed with a muscular back strain. *Id.* He admitted he had not disclosed this incident, which was work-related, explaining "I didn't really think it was an injury." (Clark Depo.p.47, line 16 - p.48, line 1).

Respondents also impeached Mr. Clark with applications for disability benefits that he filed over the telephone in 2008 and 2009. See (APApp.605-620) (the 2008 application) and (APApp.629-639) (the 2009 application). In both instances, Mr. Clark alleged he was disabled due to back pain and a combination of other ailments. (APApp.606, 633).

In December of 2017—three months after the trial—the single commissioner entered an order finding Mr. Clark was permanently and totally disabled. (12/28/17 Or.p.1). The order is lengthy and has detailed summaries of the testimony and medical evidence.

The single commissioner specifically addressed Mr. Clark's 2006 back injury as well as his 2008 and 2009 applications for disability benefits, finding Mr. Clark's testimony about his pre-injury condition was not credible. (Id.p.40, ¶9). In spite of this history, which is admittedly concerning, the single commissioner noted Mr. Clark had been on the job for seven months before he was injured in 2011, that he returned to work and worked six additional months *after* he got injured, that there was objective evidence his 2011 injury was serious, and that his prior treatment in Florida did not undermine this seriousness or the treatment Mr. Clark had received. (Id.pp.40-41, ¶¶9-16).

Respondents appealed the single commissioner's decision to the commission's appellate panel. Their request for appellate panel review included arguments that Mr. Clark had pre-existing emotional problems limiting his ability to work *before* his 2011 accident, that he had pre-existing back and neurological impairments *before* his 2011 accident, and that Mr. Clark had been "physically and psychologically disabled since 2006." (Form 30 Addendum, ¶¶6, 7, and 13). Respondents' brief followed suit, explaining Respondents believed the symptoms in Mr. Clark's leg did not count as another part of the body being affected by the injury, that these symptoms were pre-existing and not attributable to his 2011 back injury, and that he had pre-existing depression. (Resp.PanelBr.pp.17-20).

Respondents also argued the single commissioner had used the wrong date for MMI and that the finding of permanent and total disability was undermined by the fact that Mr. Clark had attended two years of college. (Id.pp.21-29). The single commissioner had noted Mr. Clark completed high school and attended two years of college. (12/28/17Or.p.7).

An appellate panel conducted oral argument in March of 2018, and in an order filed in June of 2018, the panel reversed the single commissioner. The panel held Mr. Clark was not credible and that his lack of credibility undermined the medical and vocational opinions. (Or.p.9, ¶4 & p.10, ¶7). The panel also held Mr. Clark's back injury did not affect any other parts of his body and that he had not lost any of his earning capacity. (Id.p.11, ¶4). The panel denied future medical benefits and entered an award for a 20% disability to the back. (Id.p.10, ¶¶8-9). The panel found MMI occurred July 23, 2014—nearly a year earlier than the date *Respondents* argued—and that Respondents were entitled to reimbursement of roughly \$33,000 for temporary benefits paid after MMI. (Id.p.10, ¶6 & p.11).

STANDARD OF REVIEW

The standard of review is found in section 1-23-380(5) of the South Carolina Code. See also *Lark v. Bi-Lo*, 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1981) (commission is an “agency” and subject to the Administrative Procedures Act). Per the statute, this Court may not substitute its judgment for the commission’s as to the weight of the evidence but may reverse when the decision is affected by an error of law, clearly erroneous, or arbitrary.

ARGUMENT

There are two reasons this Court should reverse the commission.

First, the commission based its decision on speculation. There is no evidence any of the medical doctors or vocational experts would have given different testimony if they had known Mr. Clark suffered from back pain with occasional leg pain in 2006 or that he had applied for disability benefits in 2008 and 2009. The “finding” that this information undermined Mr. Clark’s claim was nothing more than conjecture. Indeed, the only physician who was asked about this information explained that it had no impact on his opinion. And, as the single commissioner accurately found, Mr. Clark’s past does not negate the objective evidence that he suffered a serious injury in 2011 requiring significant treatment.

Second, the order itself is deficient. The commission did not explain several of its findings, precluding meaningful judicial review. There is no explanation of the findings that only one body part was affected, of no wage loss, and the denial of future medical treatment. The order also has findings that are clearly erroneous: The date of MMI is wrong, the percentage awarded to the back is mathematically incorrect, and the only evidence is that Mr. Clark needs at least a psychological evaluation, if not ongoing psychological treatment.

This case had some warts. No claimant is perfect, and an award of permanent disability was certainly not a foregone conclusion. But it is not faithful to the record to deny the objective evidence of a serious injury. If the commission is going to discredit the evidence that Mr. Clark's physical limitations—his inability to sit or stand for any length of time—prevent him from working, it needs to identify an evidentiary basis for that finding. The commission's order has material defects. This Court should reverse.

I. The commission impermissibly based its denial of permanent and total disability benefits on speculation. There is no evidence any of the experts would have given different testimony had they known about Mr. Clark's past.

The commission is required to ground its decisions in the evidence, not on guesses. A statute requires the commission to set forth its findings as well as the underlying facts supporting those findings. S.C. Code Ann. § 1-23-350 (Supp. ____). Precedent confirms that while the commission's factual findings are normally upheld, factual findings “may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it.” *Burnette v. City of Greenville*, 401 S.C. 417, 427, 737 S.E.2d 200, 206 (Ct. App. 2012).

In this case, however, the commission held certain information weakened the opinions of medical and vocational experts when there was no evidentiary basis for such a finding. Nobody testified that Mr. Clark's failure to inform his medical doctors or the vocational experts about his prior back injury and disability applications “undermined” the medical opinions, the treatment, and the evaluations of Mr. Clark's capacity for future employment. Yet, that is what the commission found *as a fact*. (Or.p.9, ¶4 & p.10, ¶7).

This was particularly odd because the one physician who was asked this information said it did not affect his opinion. Respondents deposed Mr. Clark's pain management doctor—Dr. Storick—who said it would not have surprised him to learn Mr. Clark had a prior back injury that caused some effects in his leg, that it would not surprise him if Mr. Clark had been given medication for that injury, and when asked “[w]ould that have had any impact on your evaluation of him related to this claim,” he answered “no.” (Storick Depo.p.17, line 20 - p.18, line 12). Precedent recognizes that the commission may disregard medical evidence in favor of other evidence in the record, *Potter v. Spartanburg Sch. Dist.* 7, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011), but that is different than the commission contradicting a doctor's testimony about whether certain information is relevant to his or her opinion.

It is perfectly fair to scrutinize the record closely, particularly when it looks at first blush like relevant information was not disclosed from the very beginning. But the truth is that Mr. Clark was diagnosed in 2006 with a muscular back strain. (APAp.2141). The evaluations from his 2008 disability application contained his reports that he was able to perform his activities of daily living “without difficulty or assistance”. (APApp.1868). His primary diagnoses following his 2009 disability evaluation was degenerative disc disease. (APAp.650). Mr. Clark also had intermittent left knee pain resulting from a knee injury and surgery while playing football in college. (APAp.1871).

Since July of 2011, however, Mr. Clark has been diagnosed with two herniated discs as well as disc material compressing one of the nerve roots in his spine. The record establishes these diagnoses were supported by objective evidence. An MRI three months

after Mr. Clark's injury confirmed the first herniated disc. (APAp.91). Another test found radiculopathy affecting a nerve root. (Id.p.98). A note from February of 2012 explains Mr. Clark was referred to surgery given "the constellation of objective findings and the failure of conservative treatment." (APAp.104). Other notes recite evidence of an "acute" injury, a disc herniation affecting the left nerve root more than the right, and that "objective" evidence supported Mr. Clark's diagnoses. (APApp.179, 455, & 1873).

This comparison shows it was simply not possible, based on the record, to conclude that the information from Mr. Clark's past undermined the medical evidence supporting his claim. Nothing in the medical evidence suggested his condition could be the result of anything other than an acute injury.

Oddly, the commission committed the same sort of error in finding this undisclosed information would have undermined the vocational opinion supporting Mr. Clark's claim. The commission emphasized that Mr. Clark told the vocational evaluators he had only completed the 12th grade when in fact he had completed two years of college. (Or.p.10, ¶7). But the record discloses Mr. Clark told both vocational evaluators he had completed some college, see (APApp.374, 1930), and both of the evaluators administered vocational tests and evaluated Mr. Clark's level of intelligence. (APApp.383 & 1932-1933).

The two evaluators reached different conclusions; one found Mr. Clark was permanently and totally disabled, the other found he was employable. They parted company over their assessment of Mr. Clark's physical capabilities. One expert believed Mr. Clark was not physically capable of working due to his inability to remain in an upright position for an 8-hour day. (APApp.374, 384). The other expert did not mention these physical

limitations. (Id.pp.1918-1945). Nothing suggests this difference of opinion had anything to do with the length of Mr. Clark's college education or whether Mr. Clark had ever experienced back pain before he suffered a herniated disc in 2011.

The commission based its denial of permanent and total disability on speculation. There is no evidence any of the medical doctors or vocational experts would have given different testimony if they had known Mr. Clark suffered from back pain with occasional leg pain in 2006 or that he had applied for disability benefits in 2008 and 2009. The only physician who was asked about this information explained it did not impact his opinion. Factual findings cannot be based on conjecture. This Court should reverse.

II. The commission erred in entering an order that does not explain important findings and containing other findings that are clearly erroneous.

The commission held only one part of Mr. Clark's body had been affected, that Mr. Clark's earning capacity had not diminished, and that he was not entitled to future medical benefits. (Or.pp.10-11, ¶¶9 & 4). The commission did not explain any of these findings.

This is a problem because administrative agencies are required to issue detailed orders explaining the agency's reasoning. If an agency fails to do so, its order will be declared invalid. See, e.g. *Canteen v. McLeod Reg'l Med. Ctr.*, 400 S.C. 551, 559, 735 S.E.2d 246, 250 (Ct. App. 2012) and *Able Communications v. S.C. Pub. Serv. Comm'n*, 290 S.C. 409, 410, 351 S.E.2d 151, 152 (1986) (articulating this rule). Here, we do not know why the commission found only one part of Mr. Clark's body was affected, why it found he has not lost any earning capacity, or why it found he was not entitled to any future medical benefits. We are simply left to guess.

We do not know, for example, whether the commission bought Respondents' argument that the neurological pain and numbness in Mr. Clark's left leg did not count as having another body part "affected" such that Mr. Clark could pursue a claim under section 42-9-10. See (Resp.PanelBr.p.17). Or, the commission might have agreed with Respondents' argument that the radiculopathy diagnosed after Mr. Clark's 2011 injury had actually been there all along and that Mr. Clark somehow managed to work through this pain for seven months before the accident and six months after the accident. We do not know what grounds the commission used to find only one body part was affected.

The same is true with respect to the commission's finding that Mr. Clark had not suffered a loss of earning capacity. As the Court is aware, an injured worker is allowed to offer evidence of the decrease in earning capacity if an injury affects multiple parts of the injured worker's body. The policy behind allowing an injured worker to present this evidence is that it allows the injured worker to establish a greater degree of disability than the disability presumed in section 42-1-30 for an injury whose effects are confined to a single body part. *Brown v. Owen Steel Co.*, 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct. App. 1994). The commission's order does not explain why it found no reduction in Mr. Clark's earning capacity. Presumably, it credited the vocational assessment concluding Mr. Clark—who had been out of work for more than two years on temporary total disability benefits—could work full-time or part time, but we do not know.

As for the denial of future medical treatment, it is difficult to come up with any possible basis for the commission's decision. As far back as 2013, Mr. Clark's surgeon said he would need an evaluation by a pain management doctor to recommend medicine.

(APA.p.20). In 2016, the same surgeon said Mr. Clark's pain management doctor would need to "optimize" Mr. Clark's medicines and consider a spinal cord stimulator. (Id.p.289).

Mr. Clark's pain management doctor said in his deposition that Mr. Clark would need pain management visits twice per year, ongoing medicine, and that "most people in [Mr. Clark's] situation usually have lifetime medicals." (Storick Depo.p.40, lines 2-7 & p.79, lines 13-16).. On the eve of trial in 2016, he referred Mr. Clark for a pre-operative interview and assessment for a test run with a spinal cord stimulator. (APAp.1872). Other doctors explained Mr. Clark would need ongoing medication. (APApp.250, 468, 1915). Mr. Clark is not aware of any opinion supporting the decision that he needs no future medical care.

The commission also entered three findings that were clearly erroneous.

First, the commission found Mr. Clark reached MMI on July 23, 2014. (Or.p.10, ¶6). This was the date Mr. Clark's surgeon referred him to a pain management doctor, (APAp.49), and a full year before Mr. Clark's pain management doctor placed him at MMI. (Id.p.124).

This was odd because Respondents had argued the pain management doctor gave the correct date for MMI. (Resp.PanelBr.p.21). The commission did not agree. This had a significant consequence for Mr. Clark because the earlier MMI date materially increased the amount Respondents had overpaid him in temporary disability benefits.

Second, the commission found Mr. Clark sustained a 20% disability to his back. The commission based this on the 20% rating from Mr. Clark's surgeon, but the record discloses that rating was a "whole person" rating, not a back rating. (APAp.489). Precedent notes that "whole person" impairment ratings are lower than ratings to the back. *Lawson v. Hanson*

Brick Am., 393 S.C. 87, 89, 710 S.E.2d 711, 712 (Ct. App. 2011) (noting a twenty-five percent whole-person rating translates to a thirty-three percent lumbar impairment). This was echoed by other records in this case, demonstrating ratings for the back that were higher than ratings for the whole person. See, e.g. (APAp.156) (twenty-five percent impairment of the whole person results in a twenty-eight percent impairment of the lumbar spine). A three percent difference in the disability award may seem trivial, but it is not.

Third and finally, the only evidence is that Mr. Clark has depression as a result of his prolonged post-surgical pain and needs at least a psychological evaluation, if not ongoing psychological treatment. The record has multiple recommendations for a psychological evaluation and/or treatment. (APApp.129-130, 230, 393-394, & Storick Depop.64, lines 3-6). There is even a report in the record explaining “[i]ndividuals with similar injuries and resulting symptoms have benefitted from routine psychiatric visits[.]” (APAp.370). The commission found the greater weight of the evidence supported that Mr. Clark had pre-existing psychological issues, (Or.p.9, ¶3), but there is no evidence he was ever given a psychological evaluation and no evidence such an evaluation was ever recommended before his injury. The only evidence is that he needs such an evaluation now.

It is perfectly fair to say this record does not paint Mr. Clark in the best light, but it is not fair to let the unfavorable things obscure the objective evidence that he was seriously injured. The single commissioner gave this case a thorough and extensive treatment, warts and all. The full commission based its decision on speculation and issued an order that failed to explain some material findings and made other findings that were clearly erroneous.

CONCLUSION

For the foregoing reasons this Court should reverse.

Respectfully submitted,



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Lamar Clark, Appellant,

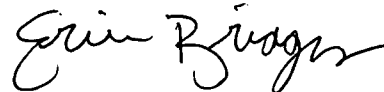
v.

Philips Electronics/Shakespeare, Employer,
and Gallagher Bassett Services, Carrier, Respondents.

PROOF OF SERVICE

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

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Erin Bridges

November 5, 2018

November 5, 2018

VIA HAND DELIVERY

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

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SC Court of Appeals

RE: Lamar Clark v. Philips Electronics/Shakespeare
Case Tracking No.: 2018-001197

Dear Ms. Kitchings:

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

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

Sincerely,



Erin Bridges

Paralegal to Blake A. Hewitt
Bluestein Thompson Sullivan, LLC

/emb

Enclosures

cc: William B. Salley, Jr., Esquire
Brooke A. Payne, Esquire