THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No.: 10024084

Appellate Case No.: 2012 - 213610

Norge L. Gonzalez Torres, (Employee/Claimant), ... Appellant,

v.

World Fiber Technologies, Inc. (Employer) and
The Standard Fire Insurance Company, c/o Travelers (Carrier), ...Respondents.

RESPONDENTS' FINAL BRIEF

RECEIVED
JUN 03 2013
SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. Whether The Workers' Compensation Commission Correctly Determined That Appellant Reached Maximum Medical Improvement On September 19, 2011 And That There Was No Evidence In The Record To Support An Award For Future Medical Treatment.

2. Whether The Workers' Compensation Commission Correctly Determined That Appellant Sustained 12% Permanent Partial Disability Based On The Substantial Evidence In The Record.

3. Whether The Workers' Compensation Commission Correctly Determined That Respondents Were Entitled To Credit For Overpayment Of Temporary Total Disability Benefits Paid To Appellant At An Incorrect Compensation Rate.

STATEMENT OF THE CASE

This matter is before this Court on appeal from the Workers' Compensation Commission. Norge L. Gonzalez-Torres ("Appellant") was involved in an admitted accident arising out of and in the course of his employment with World Fiber Technologies on February 26, 2010. Following his accident, World Fiber Technologies, and their insurance carrier, The Standard Fire Insurance Company ("Respondents") provided Appellant with appropriate causally related medical treatment until he reached maximum medical improvement ("MMI") on September 19, 2011.

On October 31, 2011, Respondents filed a Form 21 Request for Hearing to stop payment of temporary compensation, request payment of permanent partial disability, and request credit for overpayment of temporary total disability benefits paid after MMI. No Form 50 Request for Hearing was filed by the Appellant either before or after the filing of Respodents' Form 21. A hearing was held on the matter on January 27, 2012 before Commissioner Gene McCaskill ("Hearing Commissioner").

On April 23, 2012, the Hearing Commissioner issued a Decision and Order with the following findings: (1) Claimant has an average weekly wage of $390.23 and correlating compensation rate of $260.17, (2) Claimant reached MMI as of September 19, 2011 and sustained 12% permanent partial disability to the back, (3) Respondents are entitled to stop payment of temporary total disability benefits and receive credit for temporary total disability benefits paid since MMI, (4) Respondents are entitled to credit for overpayment of $43.85/week for temporary total disability benefits paid from March 1, 2010 until September 19, 2011, and (4) Appellant failed to prove he is entitled to further medical benefits, any award for serious disfigurement or any other compensable element under the law, other than the award of disability as ordered therein.

On May 2, 2012, Appellant Filed a Form 30 Request for Commission Review. The Full Appellate Panel of the Workers' Compensation Commission ("Full Commission") ruled on the record without oral arguments, and on November 16, 2012, the Full Commission issued an Order affirming the Hearing Commissioner's April 23, 2012 Order in its entirety. On December 14, 2012, Appellant filed Notice of Appeal in this Court.

STATEMENT OF THE FACTS/EVIDENCE OF THE CASE

Scope of Review

In the presentation of facts and arguments in Appellant's Initial Brief, Appellant cites to the transcript of the Claimant's deposition. As the Appellant's deposition was not submitted as evidence at the Hearing, it is not part of the record on review. Furthermore, Appellant never moved before the Full Commission for the introduction of this new evidence pursuant to Regulation 67-707 of the Workers Compensation Act. Therefore, the record upon review should be appropriately limited to the Hearing Transcript and the medical records in Respondents' APA submissions.

Hearing Testimony

Appellant was the only witness to testify at the January 27, 2012 hearing. Appellant is thirty-nine (39) years old. Appellant testified that he injured his back while working in Charleston, South Carolina, although he was living in Jacksonville, Florida at the time. (R. p. 9, lines 21-25; p. 10, line 1). Appellant testified that after returning home to Jacksonville, he received medical treatment from Dr. Kleinhans and Dr. Scharf at Jacksonville Orthopaedic Institute, and Dr. Sharf performed surgery on his back. (R. p. 63, lines 14-20).

Appellant testified that following surgery, the pain in his back changed, but it didn't go away. (R. p. 66, lines 2-3). According to the Appellant, the surgery helped with the range of motion in his back but his pain persisted. (R. p. 66, lines 6-7). Claimant testified that his pain is aggravated by certain activities, including sitting, walking, or standing for long periods of time. (R. p. 67, lines 23-25). Appellant further testified that at the time of his hearing, he did not feel he would be able to return to heavy duty work due to his ongoing symptoms. (R. p. 71, lines 10-13).

On cross examination, Appellant testified that since being released by Dr. Sharf, he has not tried to go back to work under the restrictions assigned by his authorized treating doctor. (R. p. 73, lines 15-19).

Medical Evidence

Appellant initially presented to Dr. Robert Kleinhans at Jacksonville Orthopaedic Institute on March 30, 2012, with complaints of low back pain radiating into the back of both legs to the knee. (R. p. 78). Dr. Kleinhans recommended Soma, Vicodin, and a course of physical therapy. (R. p. 79). Appellant underwent an MRI of the lumbar spine on April 28, 2010, which Dr. Kleinhans interpreted to show an L5-S1 disc herniation without nerve involvement. (R. p. 81).

On June 2, 2010, Appellant was referred to Dr. Michael Scharf, a back specialist in the same Orthopaedic practice. Dr. Sharf noted in his initial evaluation that Appellant's "[r]ange of motion is nil due to submaximal effort." (R. p. 5). Dr. Sharf's report went on to state, "I feel that there is maybe a little bit of pain behavior response, but I also think he has a real problem." (R. p. 83). Dr. Scharf recommended that Appellant undergo epidural steroid injections. (R. p. 83).

Following only temporary relief from his injections, Dr. Sharf began to discuss surgery and recommended a discogram. (R. p. 87).

On October 21, 2010, Appellant underwent an EMG/Nerve Conduction study, which yielded normal results. (R. pp. 99-101). On December 13, 2010, Appellant returned to Dr. Sharf, who indicated that Appellant's discogram was markedly positive at L4-5, L5.S1, and again he discussed a fusion surgery. (R. p. 90). On January 20, 2011, Appellant underwent surgery consisting of a bilateral decompression at L4-5, L5-S1 and a posterior lumbar interbody fusion. (R. p. 91).

Following surgery, Appellant treated post-operatively with Dr. Sharf, who again noted submaximal effort in his March 16, 2011 note. (R. p. 92). On August 22, 2011, Dr. Sharf noted that on exam, Appellant "was very self limited" and he felt Appellant was approaching MMI and needed to undergo a Functional Capacity Evaluation ("FCE"). (R. p. 95). On August 31, 2011, Appellant underwent an FCE which demonstrated his ability to work at a "light" physical demand level, but the report noted inconsistencies in his testing performance. (R. p. 103).

On September 19, 2011, Appellant returned to Dr. Sharf for a review of the FCE. Dr. Sharf agreed with the FCE that Appellant could engage in light duty work, and Appellant was released at MMI with 12% permanent impairment. (R. p. 96).

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 South Carolina Administrative Procedures Act, S.C. Code Ann. §1-23-380(A)(6)(2007), establishes the "substantial evidence" rule as the standard for judicial review of a decision of the Commission:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the administrative agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
> (d) affected by other error of law; [or]
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

An appellate court, in workers' compensation appeals, may overturn a conclusion of the Workers' Compensation Commission if that conclusion is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981).

> The test is whether the decision of the Commission is supported by substantial evidence. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action.

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

Therefore, an appellate court may overturn findings of fact of the Commission if there is no reasonable probability that the facts could be as related by the witnesses upon whose testimony the finding was based. *Lowe v. Am-Can Transport Services, Inc.*, 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). Further, an award cannot be based on surmise, conjecture, or speculation. *Tiller v. National Health Care Center of Sumter*, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999); *see also*, *McDowell v. Stilley Plywood Co.*, 210 S.C. 173, 41 S.E.2d 872 (1947) (holding testimony that is based on surmise, conjecture, and speculation has no probative value). While a finding of fact of the Commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation; instead, it must be founded on evidence of

sufficient substance to afford a reasonable basis for it. *Edwards v. Pettit Constr. Co.*, 273 S.C. 576, 257 S.E.2d 754 (1979).

ARGUMENT

I. The Workers' Compensation Commission Correctly Determined That Appellant Was At MMI As Of September 19, 2011.

Appellant argues that he has not reached MMI, and therefore he is entitled to additional medical treatment. In support of this argument, Appellant asserts that it is clear that he continues to suffer from a serious impairment and further medical care would tend to lessen his degree of impairment; however, he cites no expert medical evidence in the record in support of this claim.

The South Carolina Supreme Court has described MMI as the point when "a person has reached a plateau that, in the physician's opinion, no further medical care or treatment will lessen the period of impairment" and "signals the end of entitlement to temporary total benefits." *Curiel v. Environmental Management Services*, 376 S.C. 23, 655 S.E.2d 482 (2007). "Maximum medical improvement is a factual determination by the Commission." *Id.* "Expert medical testimony is intended to aid the Appellate Panel in coming to the correct conclusion." *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2010). "[W]hile medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record." *Tiller v. Nat'l Health Care Center*, 334 S.C. 333, 340 (1999). In this case, there is no competent evidence in the record to contradict Dr. Scharf's MMI opinion.

The only expert medical evidence in the record includes APA submissions filed by Respondents on November 22, 2011. Included in those records are the medical reports of Appellant's authorized treating doctor, Dr. Michael Scharf at Jacksonville Orthopaedic Institute. On September 19, 2011, Dr. Scharf released Appellant at MMI with a rating of 12% impairment. (R. p. 96). Dr. Sharf's opinion was unrefuted. Appellant did not submit any contradicting

medical expert opinions, nor was the opinion of Dr. Scharf ever challenged by Appellant in any medical questionnaire or deposition. The only medical evidence available in the record clearly establishes that Appellant reached MMI. (R. p. 96).

Despite the total lack of expert medical evidence supporting Appellant's argument that he has not reached MMI, Appellant contends that the Commission ignored the Appellant's continued subjective complaints of pain, loss of range of motion, and failure to see improvement following his treatment, and as a result, the Commission erred in finding him to be at MMI. In order to accept this argument as plausible, Appellant asks this court to completely disregard the only available medical evidence in the record and rely solely on the Appellant's hearing testimony.

Respondents argue that workers compensation does not award for pain and suffering. Appellant's contention that his ongoing subjective complaints of pain somehow prevent him from being at a point of MMI is inconsistent with the definition of MMI and the purpose of assigning permanent partial disability. It is a long standing principle of the workers' compensation system that "[t]here is no recognition of the elements of pain and suffering, or of discomfort or difficulty in performing work, as long as there is no diminution in earning capacity." *Keeter v. Clifton Mfg. Co., et al.*, 225 S.C. 389, 392, 82 S.E.2d 520 (citing *Parrot v. Barfield Used Parts*, 206 S.C. 381, 34 S.E.2d 802 (1945); *Dameron v. Spartan Mills*, 211 S.C. 217, 44 S.E.2d 465 (1947)). In this case, Appellant submitted no evidence in support of a claim for diminution in earning capacity.

Further, Appellant's complaints of loss of range of motion are far from unrefuted. A review of Dr. Scharf's records reveal multiple instances of questionable effort with regards to Appellant's range of motion. On June 2, 2010, Dr. Scharf states "[r]ange of motion is nil due to

submaximal effort." (R. p. 82). On the same date Dr. Scharf noted that although he recognized Appellant may have real problem, he felt "there maybe a little bit of pain response." (R. p. 83). On March 16, 2011, Dr. Scharf stated "[t]here is a lot of submaximal effort." (R. p. 92). Finally, on August 22, 2011, Dr. Scharf stated "[o]n exam he is very self limited. He will not bend at all." (R. p. 95).

In addition to Dr. Scharf's records, Appellant's functional capacity evaluation ("FCE"), conducted by Jennifer Hauser on August 31, 2011, demonstrated that Appellant was capable of light work; however, Ms. Hauser qualified her opinion by stating her findings represented the minimum at which Appellant can function due to inconsistencies demonstrated throughout the test. (R. p. 103). Specifically, Ms. Hauser noted:

> Inconsistencies in his performance included squatting: he was able to perform a full squat while lifting up to 20 pounds but couldn't ascend from a squat position without maximal assistance from bilateral upper extremities; gait: at times his gait was antalgic with a slower cadence and at times was within normal limits. At the end of the test, he was using bilateral upper extremity assistance on the stairs, yet when he left the clinic, he descended a curb without evidence of difficulty or wincing and without upper extremity assistance. (R. p. 103).

Upon receiving Appellant's hearing testimony and reviewing the available evidence in the record, the Hearing Commissioner was in the best position to make a determination with regards the factual finding of MMI, and the available evidence supported the Commissioner's finding of MMI.

II. The Workers Compensation Commission Correctly Determined That Appellant Is Not Entitled To Any Additional Medical Treatment.

Appellant argues that if Appellant is deemed to have reached MMI, he remains entitled to ongoing causally related *Dodge* medical treatment which would tend to lessen his period of disability. Again, there is no medical evidence in the record to support his argument.

S.C. Code Ann. §42-15-60 (2007) controls the time period during which medical treatment and supplies shall be furnished to a claimant. In *Dodge v. Bruccoli, Clark, Layman, Inc.*, the South Carolina Court of Appeals interpreted S.C. Code Ann. §42-15-60 (2007) and held that an employer may be liable for a claimant's medical treatment after maximum medical improvement if it "tends to lessen the claimant's period of disability." 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999). Since the holding in *Dodge*, S.C. Code Ann. § 42-15-60 has been amended to require the need for additional medical treatment to be "evidenced by expert medical evidence stated to a reasonable degree of medical certainty." S.C. Code § 42-15-60(A)(2007). In this case, Appellant has not submitted any expert medical evidence into the record in support of his claim for future treatment that would tend to lessen the period of disability, and therefore the Workers' Compensation Commission correctly found that Appellant was not entitled to additional medical treatment.

III. The Workers' Compensation Commission Correctly Determined That Appellant Sustained 12% Permanent Partial Disability To The Back In Accordance With The Substantial Evidence On The Record.

Appellant cites *Linen v. Ruscon Constr. Co.* in support of the argument that unless the question of the extent of partial loss of use under S.C. Code Ann. §42-9-30(2007) is so technically complicated as to require exclusively expert testimony, lay testimony is available." 286 S.C. 67, 68, 332, S.E.2d 211, 212 (1985). In *Linen*, the Court dealt injury to the arm, not the back. This court previously addressed this exact issue in *McLeod v. Piggly Wiggly*, stating:

> Here, we are concerned with the back, a much more complicated area of the body. The area of the body, the congenital defect and the type of injury sustained are factors which require a higher degree of expertise than was presented to determine the degree of partial loss of use.

McLeod v. Piggly Wiggly, 280 S.C. 466, 313 S.E.2d 38 (S.C.App. 1984).

The holding in *McLeod* clearly demonstrates that the back is a more complicated area of the body, and therefore, calculation of permanent partial loss of use to the back requires medical expert testimony and cannot be based on lay testimony alone, especially when that testimony contradicts the only available expert medical evidence in the record.

Appellant further argues that the Workers' Compensation Commission ignored or improperly disregarded "all" of the evidence concerning Appellant's disability with the sole exception of Dr. Scharf's release. Appellant's argument lacks merit because there was no other medical evidence available for the Commission to review or rely on other than Appellant's hearing testimony, and as *McLeod* set forth above, the back is a complicated part of the body that requires a higher degree of expertise than lay testimony alone in determining permanent disability. (*Id.*)

Appellant correctly points out that impairment and disability are two different measurements to evaluate the impact of a claimant's injury. Appellant is also correct that disability is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." S.C. Code Ann. §42-1-120(2007). In addressing awards for disability, the Supreme Court held, "[t]he burden of proving causation rests upon the Claimant. This burden could be met only by evidence the Claimant had made reasonable efforts to obtain employment and had failed because of an injury produced handicap." *Shealy v. Algernon Blair* 250 S.C. 106, 156 S.E.2d 646 (1967). In the instant case, Appellant testified that he never even tried to return to work after being released by his doctor (Hr. Tr. p. 20, lines16-19), and therefore he failed to satisfy the burden set forth in *Shealy*.

Accordingly, the Workers' Compensation Commission correctly determined that Appellant sustained 12% permanent partial disability in accordance with available evidence in the record.

IV. The Workers Compensation Commission Correctly Determined The Appropriate Compensation Rate And Awarded Respondents Credit For Payment Of Temporary Total Benefits Paid At The Incorrect Compensation Rate.

At the January 27, 2012 hearing, Respondents objected to the previously set compensation rate of $304.02, and argued that the actual payroll records reflected an average weekly wage of $327.00, with a correlating compensation rate of $218.01. (R. p. 58, lines 4-8). Following the hearing, both parties submitted their calculations for the proper compensation rate. Respondent's filed a Form 20 Earning Statement on February 16, 2012, reflecting the $218.01 compensation rate. (R. p. 24). On February 17, 2012, Appellant submitted a letter to the Hearing Commissioner indicating that an average weekly wage of $390.23 and correlating compensation rate of $260.17, and it was counsel's opinion that this was most consistent with S.C. Code Ann. §42-1-40 and avoided penalizing either party. (R. p. 133). In his Decision and Order, the Hearing Commissioner awarded the $260.17 compensation rate suggested by Appellant. (R. p. 8). Despite Appellant's previous statement that he felt this compensation rate was most consistent with S.C. Code Ann. §42-1-40 and it avoided penalizing either party, he now contends on appeal that the Commissioner erred in using Appellant's compensation rate.

Appellant argues that the Commission "appears to have based its decision" about the average weekly wage by consulting the payment history for two quarters preceding his injury, seemingly ignoring the fact that these calculations were submitted to the Commissioner by the Appellant himself. Based on the evidence he had available, the Hearing Commissioner made a factual ruling that the $260.17 compensation rate suggested by Appellant most accurately

reflected the Appellant's earnings, and this finding is supported by the substantial evidence in the record.

Appellant further argues that the Commissioner erred in requiring the employer to provide wages to that of a similar employee. S.C. Code Ann. §42-1-40(2007) allows for this method when "shortness of time during which the employee has been in the employment of his employer, or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as defined in this section." S.C. Code Ann. §42-1-40(2007). In this case, Appellant was employed for a period of 30 weeks. Respondents argue that 30 weeks is a sufficient period of time to assess a claimant's estimated future earnings, and Appellant has failed to provide any evidence that the nature of his hours was due to the casual nature or terms of his employment.

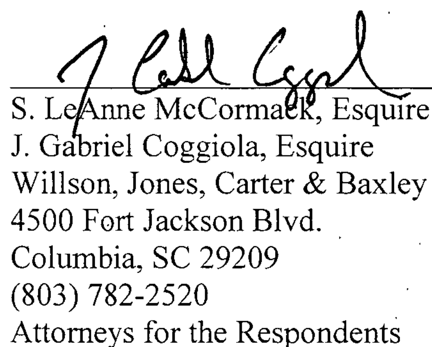
Finally, Appellant argues it would be unfair to give Respondents a credit for overpayment of temporary compensation from March 1, 2010 until September 19, 2011, since it was Respondent's initial error, and "an extremely long amount of time" passed before the error was corrected. In *Forrest v. A.S. Price Mechanical*, this Court specifically stated, "[a]t the outset we hold that the doctrines of estoppels and laches do not preclude the Commission from adjusting the average weekly wage prior to the administrative body's final determination." 373 S.C. 303, 307, 644 S.E.2d 784 (S.C.App. 2007). The court's opinion goes on to state that S.C. Code Ann. §42-17-10(2007) allows a Commissioner to adjust a claimant's compensation rate after the filing of a claim, even when the parties previously agreed to a preliminary compensation rate. *Id.* Therefore, it is clear that there is no deadline for the time to challenge a previously set compensation rate or for a Commissioner to award a change in compensation rate prior to the

issuance of an Order. As such, Appellants argument that the amount of time that passed precludes the amendment of the compensation rate is without merit.

CONCLUSION

The substantial evidence in the record leads to the conclusion that the Workers' Compensation Commission correctly determined that Appellant reached maximum medical improvement on September 19, 2011 and sustained 12% permanent partial disability to the back. Further, the Workers' Compensation Commissioner correctly adjusted the compensation rate and awarded Respondents credit for an overpayment of temporary compensation. Finally, the Workers Compensation Commission correctly found that Appellant failed to prove that he is entitled to any additional future medical treatment, any award for disfigurement, or any other compensable element under the law, other than the 12% award of disability. Accordingly, this Court should affirm the Workers' Compensation Commission's decision.

Respectfully Submitted,



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March 15, 2013
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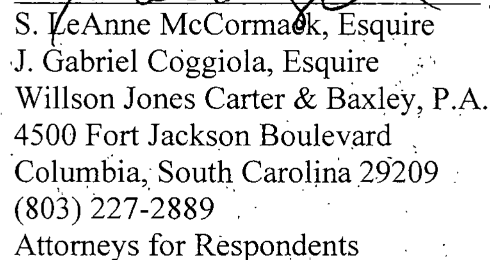

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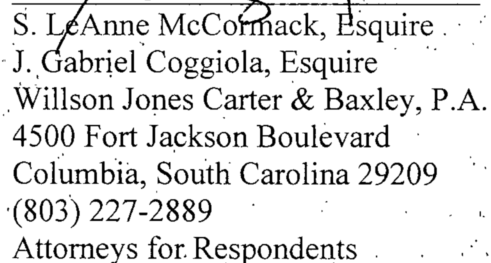
CERTIFICATE OF COUNSEL

Respondents, by and through their undersigned counsel, certify that the Respondents' Final Brief complies with Rule 211(b), SCACR.



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